FILED
DEC 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-5306

IN THE

Supreme Court of the United States

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 14, 2006
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 3/3/04]

Case No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/3/04		Prisoner Case Docketed with certificate of appealability denied. Notice filed by Appellant Keith Bowles. Transcript needed: n ❑ (jc)
3/3/04		Electronic case filing. District court record can be downloaded electronically. [04-3262] (jc)
3/4/04		Case referred to Staff Attorney Office. ❑ [04-3262] (mmm)
3/10/04		SHOW CAUSE order filed to have Keith Bowles show cause for possible jurisdictional defect involving the filing of a late notice of appeal. Response due by 3/31/04 for Paul Mancino [04-3262]. (jc)
3/15/04		APPEARANCE filed by Attorney Paul Mancino for Appellant Keith Bowles [04-3262] (jc)
3/29/04		RESPONSE by Paul Mancino for Appellant Keith Bowles regarding the showcause for jurisdiction: late notice of appeal [2916471-1] [04-3262] . (jc)

DATE	NO.	PROCEEDINGS
4/26/04		ORDER filed discharging showcause order the showcause for jurisdiction: late notice of appeal. It is ordered that the appeal is dismissed for lack of jurisdiction as it applies to the July 28, 2003 judgment and the September 9, 2003 order. The appeal was timely filed as it applies to the February 10, 2004 ruling. [2916471-1] [04-3262]. James L. Ryan, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Eric L. Clay, Circuit Judge. (jc)
8/30/04		MOTION CAUSE SUBMITTED to panel. [04-3262] (bb)
9/8/04		ORDER filed denying a certificate of appealability. [04-3262] . Entered by order of the court. (jc)
9/8/04		LETTER SENT TO district court by jc sending a certified copy of order filed 9/8/04. [04-3262] (jc)
9/20/04		PETITION for rehearing before original panel filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 9/16/04. [04-3262] (jc)
11/22/04		MOTION CAUSE SUBMITTED to panel. [04-3262] (alr)
12/28/04		ORDER filed to reinstate appeal. [04-3262], to grant in part and deny in part a certificate of appealability. The clerk's office is directed to estaalish a briefing schedule regarding certain issues. [04-3262]. Boyce F. Martin, Circuit Judge, Karen N. Moore, Circuit Judge, Robert H. Bell, Chief District Judge for the Western District of Michigan, sitting by designation. (jc)

DATE	NO.	PROCEEDINGS
12/28/04		LETTER SENT TO district court by jc sending a certified copy of order filed 12/28/04. [04-3262] (jc)
12/28/04		BRIEFING LETTER SENT setting briefing schedule: appellant brief due 2/7/05; appellee brief due 3/11/05; appendix due 4/4/05; final appellant brief due 4/25/05. [04-3262] final appellee brief due 4/25/05;. (jc)
2/7/05		PROOF BRIEF filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 2/4/05 Number of Pages: 19. [04-3262] ❑ (vf)
2/7/05		Request to require oral argument filed by Paul Mancino for Appellant Keith Bowles [04-3262] (vf)
3/14/05		APPEARANCE filed by Attorney Bruce D. Horrigan for Appellee Harry Russell [04-3262] (laj)
3/14/05		PROOF BRIEF filed by Bruce D. Horrigan for Appellee Harry Russell. Certificate of service date 3/10/05. Number of Pages: 20. [04-3262] ❑ (vf)
3/14/05		Request to waive oral argument and submit case on the briefs, (waiver on page: 1), filed by Bruce D. Horrigan for Appellee Harry Russell [04-3262] (vf)
4/4/05		APPENDIX filed by Paul Mancino for Appellants. Copies: 5 (Vol 1-3). Certificate of service date 4/1/05. [04-3262] (vf)

DATE	NO.	PROCEEDINGS
4/25/05		FINAL BRIEF filed by Bruce D. Horrigan for Appellee Harry Russell. Copies: 7. Certificate of service date 4/22/05. Number of Pages: 19. [04-3262] (vf)
4/25/05		Request to waive oral argument and submit case on the briefs, (waiver on page: 1), filed by Bruce D. Horrigan for Appellee Harry Russell [04-3262] (vf)
4/25/05		FINAL BRIEF filed by Paul Mancino for Appellant Keith Bowles. Copies: 7. Certificate of service date 4/22/05 Number of Pages: 19. [04-3262] (vf)
4/25/05		Request to require oral argument filed by Paul Mancino for Appellant Keith Bowles [04-3262] (vf)
8/15/05		Oral argument date set for October 25, 2005 in court room 636. Notice of argument sent to counsel on 8/22/05. Notice of argument sent to counsel. [04-3262] (pjm)
8/15/05		CAUSE SUBMITTED on briefs to panel consisting of Judges Boggs, Gibbons, Rose sitting on 10.25.05. [04-3262] (kal)
9/6/05		Appellant MOTION filed to postpone oral argument, or in the alternative to sibmit on briefs. Motion filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 9/2/05 [04-3262] (jc)

DATE	PROCEEDINGS
9/6/05	Appellee RESPONSE non opposition filed regarding a motion to postpone oral argument [3227760-1]; previously filed by Paul Mancino Jr.. Response from Bruce D. Horrigan for Appellee Harry Russell. Certificate of service date 9/2/05 [04-3262] (jc)
9/9/05	ORDER filed denying motion to postpone oral argument. The appellant may submit on briefs. [04-3262]. Entered by order of the court. (jc)
12/28/05	OPINION filed: DISMISSED for lack of jurisdiction [04-3262], decision for publication pursuant to local rule 206 [04-3262]. Danny J. Boggs, Authoring Chief Judge, Julia S. Gibbons, Circuit Judge, Thomas M. Rose, District Judge for the Southern District of Ohio. (jc)
12/28/05	JUDGMENT: DISMISSED. (jc)
1/11/06	Appellant MOTION filed to extend time to file petition for rehearing until 1/25/06. Motion filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 1/9/06 [04-3262] (jc)
1/12/06	LETTER SENT by jc granting motion to extend time to file petition for rehearing [3301419-1] filed by Paul Mancino Jr. Petition to be filed by 1/25/06 for Paul Mancino [04-3262] (jc)
1/23/06	ADDITIONAL PETITION for en banc rehearing filed by Paul Mancino for Appellant Keith Bowles. Certificate of service date 1/20/06. [04-3262] (blh)

DATE	NO.	PROCEEDINGS
4/21/06		ORDER filed denying petition for en banc rehearing [3307811-1] filed by Paul Mancino Jr. [04-3262]. Danny J. Boggs, Julia S. Gibbons, Circuit Judges; Thomas M. Rose, District Judge. (blh)
5/5/06		MANDATE ISSUED with no cost taxed [04-3262] (jc)
7/25/06		U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Keith Bowles. Filed in the Supreme Court on 07-14-06, Supreme Ct. case number: 06-5306. [04-3262] (swh)
12/11/06		U.S. Supreme Court letter filed granting petition for writ of certiorari [3416329-1] filed by Keith Bowles Supreme court No. 06-5306. Filed in the Supreme Court on 12-07-06. (swh)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
(Cleveland)

[Filed 8/5/2002]

Case No. 1:02-cv-01520-DCN

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/05/2002	1	Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody. Filed by Keith Bowles. Filing fee not paid (C, B) Additional attachment (civil cover sheet) added on 8/6/2002 (C, B). (Entered: 08/06/2002)
08/05/2002	2	Random Assignment of Magistrate Judge Streepy. (C, B) (Entered: 08/06/2002)
08/05/2002	3	Administrative Track DCM Initial Order. Chief Judge Paul R. Matia (C, B) (Entered: 08/06/2002)
09/03/2002	4	Order to Show Cause within 23 days of the receipt of this order the Attorney General shall make a return certifying the true cause of the detention in accordance with 28 U.S.C. Section 2243. Attach to the return

DATE	NO.	PROCEEDINGS
		certified copies of (a) the indictment, (b) the petitioner's plea, (c) the judgment of the state trial court, (d) the opinion of the Court of Appeals, (e) the decision of the Supreme Court in accorcance with 28 U.S.C. Section 2249. Petitioner shall have thirty (30) days from the filing of respondent's answer to respond thereto. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/03/2002	5	Order that this case does not neccesitate a Case Management Conference and is assigned to the Administrative Track. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/03/2002	6	Automatic Reference of Administrative Action to Judge Jack B. Streepy. Judge Donald C. Nugent (R, J M) (Entered: 09/05/2002)
09/23/2002	7	Motion for extension of time until October 28, 2002 to file answer filed by Harry Russell. (Horrigan, Bruce) (Entered: 09/23/2002)
09/25/2002	8	Order that petitioner shall either submit the filing fee- $5 - or fill out and submit an application to proceed in forma pauperis within 30 days of this order.Magistrate Judge Jack B. Streepy (S, D J) (Entered: 09/25/2002)
10/12/2002		Order (non-document) on 10/12/2002 Granting Motion for extension of time (Related Doc # 7) Magistrate Judge Jack B. Streepy (S, D J) (Entered: 10/12/2002)

DATE	NO.	PROCEEDINGS
10/24/2002	9	Return of Writ (2254) filed by Harry Russell. (Horrigan, Bruce) (Entered: 10/24/2002)
10/24/2002	10	Notice of Manual Filing filed by Harry Russell. (Related document(s)9) (Horrigan, Bruce) (Entered: 10/24/2002)
10/24/2002	11	Excerpt Transcript of proceedings in Lake County Common Pleas Court case, #98CR429. Complete document on file in the Clerk's Office (181 pages). (C, B) (Entered: 10/25/2002)
10/24/2002	12	Appendix to return of writ filed by Harry Russell. (Related document(s) 10, 9) (C, B) (Entered: 10/25/2002)
10/24/2002	13	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume I (208 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
10/24/2002	14	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume II (315 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
10/24/2002	15	Transcript of proceedings in Lake County Common Pleas Court, case #98CR429, Volume III (59 pages). Complete document on file in the Clerk's Office. (Related documents(s) 10) (C, B) (Entered: 10/25/2002)
12/02/2002	16	Traverse to Return of Writ and brief filed by Keith Bowles. (Related document(s)9) (C, B) (Entered: 12/02/2002)

DATE	NO.	PROCEEDINGS
05/23/2003	17	Report and Recommendation that the petition be denied. Magistrate Judge Jack B. Streepy (S, DJ) (Entered: 05/23/2003)
05/23/2003	18	Order terminating case referral and returning file to Judge Nugent. Magistrate Judge Jack B. Streepy (issued by U.S. Mail to counsel for Petitioner) (S, DJ) (Entered: 05/23/2003)
06/03/2003	19	Motion for extension of time until 7/1/03 to file objections to the report and recommended decision filed by Keith Bowles. (Related document(s) 17) (C, B) (Entered: 06/03/2003)
06/27/2003	20	Objections and exceptions to Report and Recommendation filed by Keith Bowles. (Related document(s)17) (C, B) Modified text on 6/27/2003 (C, B). (Entered: 06/27/2003)
07/10/2003	21	Response to Petitioner's Objections to Magistrate Judge's Report and Recommendation filed by Harry Russell. (Related document(s)20) (Horrigan, Bruce) (Entered: 07/10/2003)
07/10/2003	22	Memorandum, Opinion Adopting the Magistrate Judge's Report and Recommended Decision and Denying the petition for a writ of habeas corupus; the court further certifies, pursuant to 28:1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. Donald C. Nugent, Judge (Related documents 17) (C, B) (Entered: 07/28/2003)

DATE	NO.	PROCEEDINGS
07/10/2003	23	Judgment, in accordance with the Memorandum Opinion, Denying Petitioner's motion filed pursuant to 28:2254; and certifying, pursuant to 28:1915(a)(3), that an appeal from this deacision could not be taken in good faith and there is no basis upon which to issue a certificate of appealability. Donald C. Nugent, Judge (Related documents 22) (C, B) (Entered: 07/28/2003)
08/06/2003	24	Motion for new trial or to alter and amend judgment filed by Keith Bowles. (Attachments: # 1 Exhibits) (Related document(s) 22, 23) (C, B) (Entered: 08/06/2003)
09/09/2003	25	Order denying Motion for new trial (Related Doc # 24), denying Motion to alter/amend judgment (Related Doc # 24) Judge Donald C. Nugent(R, J M) (Entered: 09/09/2003)
12/12/2003	26	Motion to vacate order denying new trial and to reopen time to appeal filed by Keith Bowles. Related document(s)25. (Attachments: # 1. Affidavit of counsel)(C, B) (Entered: 12/12/2003)
02/10/2004	27	Marginal Order that as to re-opening of appeal pursuant to Rule 4(a)(6), motion granted in part and appeal to be filed by 2/27/2004; motion denied in part as to Motion to vacate (Related Doc # 26). Signed by Judge Donald C. Nugent on 2/10/2004.(E, S) (Entered: 02/10/2004)

DATE	NO.	PROCEEDINGS
02/26/2004	28	NOTICE OF APPEAL to the 6th Circuit Court of Appeals from the 22 Memorandum of Opinion and 23 Judgment Entry of 7/10/03 and from the 25 Order of 9/9/03, filed by Keith Bowles (Attachments: #(1) Marginal order of 2/10/04). (H, S P) Modified text 3/8/2004 (C, K A). (Entered: 02/27/2004)
03/08/2004	29	Acknowledgment from the USCA for Sixth Circuit of receipt of notice of appeal 28 (USCA #04-3262). (C, K A) (Entered: 03/08/2004)
03/08/2004	30	USCA Appeal Fees received $ 255.00 receipt number 659108 re 28 Notice of Appeal (C, K A) (Entered: 03/08/2004)
09/10/2004	31	True copy of order from the USCA for the Sixth Circuit denying application for certificate of appealability (USCA #04-3262). Date issued 9/8/04. (related doc 28) (C, K A) (Entered: 09/13/2004)
01/03/2005	32	Order of USCA for the Sixth Circuit: Granting in part and denying in part a certificate of appealability as to 28 Notice of Appeal (USCA# 043262). USCA Clerk's office is to establish a briefing schedule. Circuit Judges: Martin and Moore, District Judge: Bell (Related document 31) (H, S P) (Entered: 01/04/2005)
12/30/2005	33	Information Copy of opinion from USCA for the Sixth Circuit: Dismissing the 28 Notice of Appeal, for lack of jurisdiction (USCA# 043262). This is not a mandate

DATE	NO.	PROCEEDINGS
		order. Circuit Judges: Boggs and Gibbons, District Judge: Rose. Date issued by USCA 12/28/05 (Attachments: # 1 Judgment) (H, S P) (Entered: 12/30/2005)
05/08/2006	34	True copy of mandate from the USCA for the Sixth Circuit: Dismissing the 28 Notice of Appeal, for lack of jurisdiction (USCA# 04-3262). Date issued by USCA 5/5/06 (Related document 33) (H, S P) (Entered: 05/09/2006)
08/02/2006	35	Appeal Remark from US Supreme Court: The petition for a writ of certiorari was filed 7/14/06 and placed on the docket 7/18/06 as No. 065306 (H, S P) (Entered: 08/03/2006)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Name: Keith Bowles

Prisoner No.: 368 795

Case No.: 1:02CV 1520

Place of Confinement: Lebanon Correctional Institution
P.O. Box 56
Lebanon, Ohio 45036

Name of Petitioner: Keith Bowles v.

Name of Respondent: Harry Russell

The Attorney General of the State of: Ohio

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Court of Common Pleas of Lake County; Case 98CR000429
2. Date of judgment of conviction: March 6, 1999
3. Length of sentence: Fifteen Years To Life
4. Nature of offense involved (all counts): Murder
   Ohio Revised Code Sec. 2903.02
5. What was your plea? (Check one)

   (a) Not guilty X
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury X
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes X No ☐

8. Did you appeal from the judgment of conviction?
   Yes X No ☐

9. If you did appeal, answer the following:

   (a) Name of court: Court of Appeals for Lake County

   (b) Result: Judgment Affirmed

   (c) Date of result and citation, if known: May 15, 2001; Case No. 99–L-075

   (d) Grounds raised: All grounds raised in this petition were raised in the appeal to the Court of Appeals for Lake County

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

      (1) Name of court: Ohio Supreme Court

      (2) Result: Motion for Leave to Appeal Denied

      (3) Date of result and citation, if known: September 15, 2001; Case No. 01-1108

      (4) Grounds raised: All grounds raised in this petition were raised in the appeal to the Ohio Supreme Court

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

      (1) Name of court _____

      (2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No X

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ❑ No ❑

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ❑ No ❑

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ❑ No ❑
(2) Second petition, etc. Yes ❑ No ❑

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SIXTH AMENDMENT

Supporting FACTS (*state briefly* without citing cases or law): Petitioner was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who was a blck or African-American. Moreover prospective jurors who were called for the

trial had recent exposure to the trial of a co-defendant and had information from that trial thus could not be fair and impartial.

B. Ground two: FOURTEENTH AMENDMENT

Supporting FACTS (state *briefly* without citing cases or law): Petitioner was denied due process of law when the court called a co-defendant, Richard T. Hayden as a court's witness. This enhanced the credibility of Richard T. Hayden and prevented petitioner from having a fair trial.

C. Ground three: FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

Supporting FACTS (state briefly without citing cases or law): Petitioner was denied due process of law and a fair trial when the court permitted questioning of petitioner when he testified as a witness and later commented on the fact that petitioner did not come forward and voluntarily make a statement to the police. Petitioner's right to a fair trial was further compromised when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

D. Ground four: FOURTEENTH AMENDMENT

Supporting FACTS (state briefly without citing cases or law): Petitioner was denied a fair trial when the prosecutor was permitted to elicite from a co-defendant that he had been convicted and did not give any limiting instruction to the fact that the co-defendant had been convicted.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ❑ No X ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: None

(b) At arraignment and plea: Public Defender

GROUND FIVE: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law when the court refused to instruct on any lesser included offense including the offense of assault. Petitioner's version of the events required that that be submitted to the jury.

GROUND SIX: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving aiding and abetting.

GROUND SEVEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court instructed the jury that an "accomplice" had testified for the prosecution thus implying that petitioner was an accomplice of the witness.

GROUND EIGHT: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court would not instruct that the state had to prove a culpable mental state to convict petitioner. The court also so improperly instructed the jury concerning flight when that was not an issue and deprived petitioner of a fair trial.

GROUND NINE: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury which inflamed the jury, misrepresented the evidence and also urged the jury to convict because petitioner did not come in to make a statement to the police.

GROUND TEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of law and equal protection of the law when was convicted of murder, which under the Ohio statutory scheme, if the equivalent of involuntary manslaughter. Murder carries a penalty of fifteen (15) years to life. Involuntary manslaughter carries a maximum sentence often (10) years. Yet for the same elements petitioner was sentenced to fifteen (15) years to life thus violating his right of due process of law and equal protection of the law.

GROUND ELEVEN: FOURTEENTH AMENDMENT

SUPPORTING FACTS: Petitioner was denied due process of a law when there was insufficient evidence presented to convict petitioner as an aider and abettor.

(c) At trial: Paul Mancino, Jr.

(d) At sentencing: Same

(e) On appeal: Same

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ❑ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ❑ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ❑ No ❑

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR.
75 Public Square, Ste. 1016
Cleveland, Ohio 44113
(216) 621-1742

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

/s/ Keith Bowles
KEITH BOWLES
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520

Judge Donald C. Nugent

Magistrate Judge Streepy

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL, Warden,

Respondent.

RESPONDENT HARRY RUSSELL'S ANSWER AND RETURN OF WRIT

Respondent respectfully answers the petition for writ of habeas corpus filed in the United States District Court, Northern District of Ohio, Eastern Division. The petition was filed pursuant to 28 U.S.C. § 2254 by Keith Bowles, inmate #368-795, a person in state custody.

Respondent, Harry Russell is Warden of the Lebanon Correctional Institution, Lebanon, Ohio. As Warden, Respondent maintains custody of Petitioner, pursuant to a journal entry of sentence issued by the Court of Common Pleas for Lake County, Ohio, upon conviction for murder, in violation of O.R.C. § 2903.02. (Exhibit 7, Lake County Court of Common Pleas Case No. 98 CR 429). Respondent denies each and every ground for relief contained in the petition for writ of habeas corpus except for those grounds expressly admitted in the instant return and attachments hereto.

Respectfully submitted,

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MEMORANDUM

I. STATEMENT OF FACTS

Respondent's statement of facts pertaining to Petitioner's case is adopted from the Opinion filed in the Court of Appeals for the Eleventh Appellate District, Case Number 99-L-075, Exhibit 15 at pages 2-3 and are essentially as follows:

On the evening of August 22, 1998, appellant and three of his friends, Richard Hayden, a.k.a. "Snoop", Damon Anderson, a.k.a "Long", and Jamal Russell, a.k.a. "Dred", drove from Cleveland to see a rap music group perform at Hellbusters, a bar in Fairport Harbor, Ohio. Appellant and his friends left the bar at 2:30 a.m., and drove to Painesville to attend an after-hours party at the Argonne Arms Apartment complex. On their way to the party, they drove past a bar named Nino's located on Prospect Street in Painesville. Outside Nino's, Hayden saw his cousin, Marcus Moore, a.k.a. "Choc", who appeared to be injured, yelling at police officers. When appellant and his friends drove past the bar again to look for Moore, he was gone. The group proceeded to drive up Prospect Street, where they saw Moore and some of their other friends from Cleveland. Appellant, Hayden, Long, and Russell learned that Moore and the others had been jumped and beaten up by a group of guys from Painesville, Antonio Rymmer, a.k.a "Stickman", and his friends.

Appellant, Hayden, Long and Russell then decided to drive to the Argonne Arms Apartment complex to find Rymmer and beat him up in revenge for jumping their friends. When they arrived at the apartment complex, they found Rymmer, but because he was holding a gun, they drove past him. As they were driving through the complex, they also saw another man, later identified as Kenneth Johnson, a.k.a. "Dirty", holding a rifle and taking to Long's brother, Delmarcus, a.ka. "Peanut." They next encountered Ollie Gipson, a.k.a. "Nato" or "Trenne", whom they did not know. At that point, appel-

lant, Hayden, and Long got out of the car and started to beat Gipson by punching, kicking and stomping on him. Gipson died as a result of the injuries he sustained in the attack.

II. PROCEDURAL POSTURE

On September 4, 1998, the Grand Jury for Lake County, Ohio returned a single count indictment, charging Petitioner with murder in violation of O.R.C. § 2903.02. (Exhibit 2, Lake County Court of Common Pleas Case No. 98 CR 429).

On January 5, 1999, Petitioner, through counsel, filed a motion to dismiss. (Exhibit 3). On January 25, 1999, the State of Ohio filed a brief in opposition to Petitioner's motion to dismiss. (Exhibit 4). On February 12, 1999, the trial court denied Petitioner's motion to dismiss. (Exhibit 5).

A jury trial commenced on March 1, 1999. (See Exhibit 1, Docket). On March 3, 1999, the jury returned a guilty verdict, as charged in the indictment. (Exhibit 6 & 7). On that same date, Petitioner was sentenced to an indefinite term of fifteen (15) years to life in prison for the offense of murder. (Exhibit 7, Case No. 98 CR 429).

On March 9, 1999, Petitioner, through counsel, filed a motion for judgment of acquittal or, in the alternative motion for new trial. (Exhibit 8). On March 24, 1999, the State filed an opposition to the Petitioner's motion. (Exhibit 9). On April 13, 1999, the trial court denied Petitioner's motion for judgment of acquittal and motion for new trial. (Exhibit 10).

A. Petitioner's Direct Appeal

On May 10, 1999, Petitioner, through counsel, filed a notice of appeal to the Ohio Court of Appeals for the Eleventh Appellate District from the judgment of conviction and sentence entered on March 9, 1999 and from the order of the Common Pleas Court overruling defendant's motion for judgment of acquittal, or in the alternative a motion for a new trial, which was entered April 14, 1999. (Exhibit 12, assigned

Case No. 99 L 075). On December 13, 1999, Petitioner, through counsel, filed an appellate brief raising thirteen (13) assignments of error, to wit:

I. Defendant was denied a fair and impartial trial jury venire.

II. Defendant was denied due process of law when the Court called Richard T. Hayden as a Court's witness.

III. Defendant was denied due process of law and a fair trial when the Court permitted questioning of defendant and commented on the fact defendant did not make a statement to the police.

IV. Defendant was denied a fair trial when the Court permitted evidence to be offered concerning efforts made to contact the defendant.

V. Defendant was denied a fair trial when the prosecutor elicited from Richard T. Hayden that he had been convicted of murder.[1]

VI. Defendant was denied due process of law when the Court refused to instruct on the lesser-included offense of assault.

VII. Defendant was denied due process of law when the Court improperly informed the jury concerning a presumption of aiding and abetting.

VIII. Defendant was denied due process of law and a fair trial when the Court instructed the jury that an "accomplice" had testified.

IX. Defendant was denied due process of law when the Court would not instruct on a culpable mental state.

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[1] The fifth assignment of error argued that the trial court erred by failing to give a limiting instruction to the jury regarding the co-defendant's conviction.

X. Defendant was denied due process of law when the Court instructed on flight.

XI. Defendant was denied a fair trial by reason of improper prosecutorial argument.

XII. Defendant was denied due process of law when the Court overruled defendant's motion to dismiss.

XIII. Defendant was denied due process of law when the Court overruled defendant's motion for judgment of acquittal.

(Exhibit 13). On March 10, 2000, the State filed a brief opposing the assignments of error raised by Petitioner. (Exhibit 14). On May 14, 2001, the state appellate court issued its Opinion affirming the trial court's judgment of conviction and sentence and denial of Petitioner's motion for judgment of acquittal or new trial. (Exhibit 15, Case No. 99 L 075).

On May 22, 2001, Petitioner, through counsel, filed an application for reconsideration. (Exhibit 16). On July 11, 2001, the appellate court denied Petitioner's motion. (Exhibit 17).

On June 18, 2001, Petitioner, through counsel, filed a notice of appeal from the decision rendered by the Eleventh District Court of Appeals on May 14, 2001, as well as a memorandum in support of jurisdiction in the Ohio Supreme Court. (Exhibits 18 & 19, Case No. 01-1108). Petitioner asserted thirteen (13) propositions of law, to wit:

Proposition of Law One: A defendant was denied a fair trial jury venire, which contains no African-American juror and has been exposed to pretrial publicity.

Proposition of Law Two: A defendant is denied due process of law when a court calls a co-defendant as a Court's witness.

Proposition of Law Three: A defendant is denied due process of law and a fair trial when a Court permits

questioning of a Defendant and comments on the fact Defendant did not come in and voluntarily make a statement to the police.

Proposition of Law Four: A defendant was denied a fair trial when a Court permits evidence to be offered concerning efforts made by police to contact a defendant for a statement.

Proposition of Law Five: A defendant is denied a fair trial when the prosecutor elicits from a co-defendant that he has been convicted and a court gives no limiting instruction.

Proposition of Law Six: A defendant is denied due process of law when a Court refuses to instruct on the lesser-included offense of assault.

Proposition of Law Seven: A defendant is denied due process of law when a court improperly informs a jury concerning a presumption of aiding and abetting.

Proposition of Law Eight: A defendant is denied due process of law and a fair trial when a court instructs the jury that an "accomplice" had testified for the prosecution.

Proposition of Law Nine: A defendant is denied due process of law when the court would not instruct on a culpable mental state.

Proposition of Law Ten: A defendant is denied due process of law when a court improperly instructs a jury on flight.

Proposition of Law Eleven: A defendant is denied a fair trial when improper prosecutorial argument is made.

Proposition of Law Twelve: A newly enacted version of murder contained in §2903.02(B)(C) violates due process of law and equal protection of the law.

> Proposition of Law Thirteen: A defendant is denied due process of law when there is insufficient evidence to convict defendant as an aider and abettor.

(Exhibit 19). On July 17, 2001 the State filed a memorandum in opposition to jurisdiction. (Exhibit 20). On September 5, 2001, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Exhibit 21, Case No. 01-1108). This decision was not appealed to the United States Supreme Court.

B. Federal Action: Petition for Writ of Habeas Corpus

On August 6, 2002, Petitioner, through counsel, filed the instant Petition for Writ of Habeas Corpus, raising the following grounds for relief:

> GROUND ONE: Sixth Amendment.
> SUPPORTING FACTS: Petitioner was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who was black or African-American. Moreover, prospective jurors who were called for the trial had recent exposure to the trial of a co-defendant and had information from that trial thus could not be fair and impartial.
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> GROUND TWO: Fourteenth Amendment.
> SUPPORTING FACTS: Petitioner was denied due process of law when the court called a co-defendant, Richard T. Hayden, as a court's witness. This enhanced the credibility of Richard T. Hayden and prevented petitioner from having a fair trial.
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> GROUND THREE: Fifth, Sixth and Fourteenth Amendments.
> SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court permitted questioning of petitioner when he testified as a witness and later commented on the fact that Petitioner did not

come forward and voluntarily make a statement to the police. Petitioner's right to a fair trial was further compromised when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

GROUND FOUR: Fourteenth Amendment.
SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to elicit from a co-defendant that he had been convicted and did not give any limiting instruction to the fact that the co-defendant had been convicted.

GROUND FIVE: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when the court refused to instruct on any lesser-included offense including the offense of assault. Petitioner's version of the events required that that be submitted to the jury.

GROUND SIX: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving aiding and abetting.

GROUND SEVEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court instructed the jury that an "accomplice" had testified for the prosecution thus implying that Petitioner was an accomplice of the witness.

GROUND EIGHT: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and a fair trial when the court would not instruct that the state had to prove a culpable mental state to convict petitioner. The court also so improperly

instructed the jury concerning flight when that was not an issue and deprived Petitioner of a fair trial.

GROUND NINE: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury, which inflamed the jury, misrepresented the evidence and also urged the jury to convict because Petitioner did not come in to make a statement to the police.

GROUND TEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law and equal protection of the law when he was convicted of murder, which under Ohio statutory scheme, is the equivalent of involuntary manslaughter. Murder carries a penalty of fifteen (15) years to life. Involuntary manslaughter carries a maximum sentence of ten (10) years. Yet for the same elements Petitioner was sentenced to fifteen (15) years to life thus violating his right to due process of law and equal protection.

GROUND ELEVEN: Fourteenth Amendment
SUPPORTING FACTS: Petitioner was denied due process of law when there was insufficient evidence presented to convict Petitioner as an aider and abettor.

(Doc. 1, Petition).

III. AVAILABILITY OF TRANSCRIPTS

Complete copy of the Transcript of Proceedings, as filed in the Ohio Court of Appeals for the Eleventh Appellate District, have been filed under separate cover.

Pursuant to this Court's Show Cause Order of September 3, 2002 and the rules governing Section 2254 cases, Respondent respectfully submits the following:

IV. TRUE CAUSE OF DETENTION

The true cause of Petitioner's detention is attached as Respondent's Exhibit 7.

V. PREVIOUS FEDERAL PETITION

To the best of Respondent's knowledge, Petitioner has not filed a previous federal petition for writ of habeas corpus.

VI. STATUTE OF LIMITATIONS

The one-year statute of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. Petitioner's judgment of sentence was journalized on March 9, 1999. (Exhibit 7, Case No. 98 CR 429). A motion for judgment of acquittal, or in the alternative for new trial, was filed that same day. (Exhibit 8). The trial court's denial of the motion was journalized on April 14, 1999. (Exhibit 10). A notice of appeal was filed on May 10, 1999. (Exhibit 12). The Ohio Court of Appeals for the Eleventh Appellate District affirmed the judgment of conviction and sentence on May 14, 2001. (Exhibit 15, Case No. 99 L 075). On June 18, 2001, a notice of appeal and a memorandum in support of jurisdiction were filed in the Ohio Supreme Court. (Exhibits 18 & 19). On September 5, 2001, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Exhibit 21, Case No. 01-1108). This decision was not appealed to the United States Supreme Court within 90 days of journalization. The judgment of conviction and sentence, therefore, became final on December 4, 2001. Petitioner had one year, or until December 4, 2002, in which to file a federal habeas petition. No other collateral action served to toll or extend the limitations period.

Petitioner filed this petition on August 6, 2002. (Doc. 1, Petition). It therefore appears that the statute of limitation

does not bar further consideration of the instant federal petition for writ of habeas corpus.

VII. LAW & ARGUMENT

A. Standard of Review

Federal habeas corpus is available only to correct wrongs of constitutional dimension. 28U.S.C. § 2254(a); *Smith v. Phillips*, 455 U.S. 209 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Also, it is the obligation of the federal courts to accept as valid a state court's interpretation under state law of the statutes and rules of practice of that state. *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). A federal habeas court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 USC § 2241; *Estelle v. McGuire, supra.*

Petitioner is not entitled to federal habeas corpus relief, unless the state court's adjudication of a federal question resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 402-03 (2000) (O'Connor, J., writing for the majority on this issue); *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). A state court decision is "contrary to" clearly established federal law as determined by the United States Supreme Court under § 2254(d)(1) if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the

Supreme Court has on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06 (O'Connor, J.); *Harris*, 212 F.3d at 942.

An "unreasonable application" of Supreme Court precedent occurs (1) if the state court identifies the correct legal standard but unreasonably applies it to the facts of the case, or (2) if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407-08 (O'Connor, J.). Under § 2254(d)(1), the unreasonable application clause, a federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411 (O'Connor, J.); *see also McGhee v. Yunkins*, 229 F.3d 506, 510 (6th Cir. 2000); *Harris*, 212 F.3d at 942. The reasonableness inquiry is an objective one. It does not involve a subjective inquiry into whether or not reasonable jurists would all agree that the state court's application was unreasonable. *Williams*, 529 U.S. at 409-10 (O'Connor, J.); *see also Washington v. Hofbauer*, 228 F.3d 689, 698 (6th Cir. 2000); *Harris*, 212 F.3d at 942-43. Moreover, the writ may issue only if the application is objectively unreasonable "in light of the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision." *McGhee*, 229 F.3d at 510, 512 (citing *Williams*, 529 U.S. at 412).

If the petitioner challenges the state court's determination of the facts rather than its application of law, the § 2254(d)(2) applies. The writ will issue only if the state court made an unreasonable determination of the facts in light of the evidence presented. The habeas court must presume the correctness of the factual findings made by the state court. *Warren v.*

Smith, 151 F.3d 358, 360 (6th Cir. 1998) (citing 28 U.S.C. § 2254(e)(1)). To rebut this presumption, the petitioner must present clear and convincing evidence to the contrary. *Id.* at 360-61.

The Sixth Circuit Court of Appeals held, in *Harris v. Stovall, supra*, that the standards of 28 U.S.C. § 2254(d) apply even when there is no state court decision to evaluate. The Sixth Circuit went on to hold that the federal habeas court's review would not be a full *de novo* review of the claims, but "remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* Thus, where a state court decides a constitutional issue by form order or without an extended discussion, "a habeas court should then focus on the *result* of the state court's decision, applying the standard articulated [in *Williams*]." *Id.*, fn. 1.

In the instant petition, Petitioner presents both federal questions and state law claims that have been previously addressed on the merits by the state courts on direct appeal. Respondent submits that Petitioner's state law claims should be dismissed as non-cognizable grounds for federal habeas relief. Respondent further submits that those claims presented as federal questions or, which give rise to concerns of due process and fundamental fairness, should be denied as each has been found to be without merit in the state courts, pursuant to a reasonable application of clearly established federal law.

B. Jury Venire

As his *first ground for relief*, Petitioner alleges that he was denied a fair and impartial jury venire, from which to select the jury that would hear his case. (Doc. 1, Petition at p. 6). Similar claims were raised as the first assignment of error on direct appeal to the state appellate court and the first proposition of law in support of jurisdiction in the Ohio Supreme

Court. (Exhibits 13 & 19). In particular, Petitioner complains that: (1) the venire did not include any African-Americans; and (2) the prospective jurors had recent exposure to the separate trial of a co-defendant, Michael Love.

The United States Supreme Court has held that a petit jury venire must represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528-9 (1975). The Court in *Taylor* also held that there is no constitutional right to a jury of any particular composition. 419 U.S. at 538. The Court has further held that the fair cross-section requirement does not apply to petit juries themselves, largely because it would restrict the peremptory challenge device. *Holland v. Illinois*, 493 U.S. 474, 480-4 (1990).

The Court has further held that a defendant establishes a *prima facie* violation of the fair cross-section requirement when he shows that the group excluded is (1) distinctive; (2) not fairly represented in the venire from which the petit jury is chosen; and (3) that the under-representation resulted from a systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Citing state case law, which applies and follows the *Duren* decision, the state appellate court concluded, as follows:

> In the instant case, appellant has not demonstrated that the representation of African-Americans in the jury venires is not fair and reasonable in relation to the number of such persons in Lake County. Furthermore, appellant has not presented any evidence from which we can infer that the number of African-Americans included in jury venires in Lake County is due to systematic exclusion of this racial group in the jury selection process. Therefore, we cannot conclude that appellant's Sixth Amendment right to have a jury comprised of a fair cross-section of the community was violated.

(Exhibit 15 at p. 6). In this case, Petitioner's bare assertions do not satisfy the *Duren* test. Indeed, the assertions are unsupported by any evidence whatsoever and constitute nothing more than an attempt to create a constitutional issue where none exist. Inasmuch as no systematic exclusion of African-Americans can be shown in this case, this claim lacks merit and should be denied.

Although the docket does not reflect any effort by the defense to seek a change of venue, Petitioner argues that he was denied a fair trial because the prospective jurors had recent exposure to the separate trial of a co-defendant. Additionally, it is critical to note that following extensive questioning during voir dire, none of the prospective jurors indicated that they had formed opinions based upon their exposure to publicity relating to the other case. It would be inappropriate to challenge for cause, where a prospective juror is merely aware of the circumstances or outcome of a co-defendant's previous trial and has not formed an opinion as to the defendant's guilt. Reviewing this same claim on direct appeal, the state appellate court noted that:

> [M]ere exposure to pre-trial publicity does not necessarily taint a jury venire. Prospective jurors who are merely aware of some of the publicized circumstances of a crime but have not previously formed or expressed opinions with respect to the defendant's guilt are not subject to challenges for cause during voir [dire] when the trial court is satisfied from their examination that they can be impartial. [*citing, State v. Duerr*, 8 Ohio App.3d 404 (1982)].
>
> In the instant case, a review of voir dire reveals that none of the jurors at appellant's trial indicated that they had formed an opinion as to appellant's guilt prior to the commencement of the trial. We cannot conclude that appellant was denied a fair and impartial jury due to the jurors' exposure to pretrial publicity.

(Exhibit 15 at p. 6). Petitioner's claim fails to establish a denial of fundamental fairness or violation of due process and is therefore not entitled to habeas relief.

Respondent submits that Petitioner's *first ground for relief*, asserting claims with respect to the jury venire, fails on the merits and should therefore be denied.

C. Evidentiary Ruling

As his *second ground for relief*, Petitioner alleges that he was denied due process of law when the trial court called co-defendant Richard Hayden as a court's witness. (Doc. 1, Petition at p. 5). Similar claims were raised unsuccessfully as the second assignment of error on direct appeal to the state appellate court and the second proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). In essence, Petitioner challenges the trial court's evidentiary ruling, pursuant to Evid. R. 614(A), which permitted both parties to "cross-examine" the witness. Respondent submits that this claim asserts an abuse of discretion that has been found to be without merit on direct appeal in the state courts, and is therefore not cognizable for purposes of federal habeas review. *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir. 1998), *cert. denied*, 525 U.S. 935 (1998), citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Hutchinson v. Marshall*, 744 F.2d 44, 46-47 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985).

The Ohio Court of Appeals for the Eleventh Appellate District, being the only state court to reach the merits of this claim, opined:

> In the instant case, we cannot conclude that the trial court abused its discretion by calling Hayden as a court's witness. The prosecutor informed the trial court that counsel for Hayden had indicated that Hayden would not cooperate with the prosecution. Hayden's testimony at trial affirms the prosecutor's assessment that Hayden

> would not have cooperated with the state. *** Hayden had written a letter *** that he would try to help *** [petitioner] during [his trial]. The trial court was reasonably justified in believing that calling Hayden, who had previously been convicted of murder for his participation in the attack on [the victim], as a court's witness would benefit the jury in performing its fact-finding responsibilities.

(Exhibit 15 at pp. 8-9). Evid.R. 614(A) does not require a showing of surprise or inconsistency before the court calls a witness on its own. The trial court's decision to call its own witness will not be reversed, absent a showing of an abuse of discretion. *State v. Adams*, 62 Ohio St.2d 151, 157. The trial court does not abuse its discretion if it is reasonably justified in believing that the calling of this person as a court witness "would be beneficial to the jury in performing its fact-finding responsibilities." *Id.* at 158.

With respect to state court evidentiary rulings, the Sixth Circuit has held that habeas review is extremely limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). Petitioner is entitled to federal habeas corpus relief only where a state's evidentiary rule resulted in the denial of fundamental fairness, and therefore, a violation of due process. *Brown v. O'Dea*, 187 F.3d 572, 578 (6th Cir. 1999); *See also Wrigth v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993); *Cooper v. Sowder*, 837 F.2d 284, 287 (6th Cir. 1988).

Additionally, it should be noted that the Federal Rules of Evidence are not constitutionally based. *Dowling v. US.*, 493 U.S. 342 (1990). It follows that if the Rules of Evidence are not constitutionally mandated, then they cannot dictate constitutional results. Because federal habeas corpus relief does not lie for errors of state law, the federal court must respect state court findings of fact and application of its own law, rather than engage in *de novo* review. *Lewis v. Jeffers*, 497

U.S. 764, 780 (1990). It may not "peer majestically over the [state] court's shoulder in order to second-guess the facts." *Id.*

Even if it was successfully argued that the trial court's evidentiary ruling was an abuse of discretion, or in violation of state law, Petitioner has failed to establish that said violation resulted in the denial of fundamental fairness, and therefore, a violation of due process. Only then, would Petitioner be entitled to federal habeas corpus relief *Brown v. O'Dea, supra.* It is respectfully submitted that this Honorable Court has no basis for disputing the state court's interpretation of its own law. As such, Petitioner's *second ground for relief* should be denied.

D. Relevant Evidence

As his *third ground for relief*, Petitioner alleges that he was denied due process of law when the trial court permitted questioning about his failure to come forward and make a statement to the police. Additionally, Petitioner argues that the trial court erred by permitting the State to present evidence of the police's efforts to contact him during the investigation. (Doc. 1, Petition at p. 6). Similar claims were raised unsuccessfully as the third and fourth assignments of error on direct appeal to the state appellate court and the third and fourth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that petitioner's claims are without merit and should be denied.

Petitioner's argument on direct appeal cited case law, which stood for the proposition that the State may not impeach the accused with evidence of his *post arrest* silence. (*See*, Exhibit 13 at pp. 9-10). In view of the relevant facts and circumstances, Petitioner's reliance on this line of cases is misplaced. The state appellate court concluded:

> In the instant case, the prosecution did not attempt to impeach appellant by claiming that he failed to make a

> statement to the police after he was arrested. Rather, the prosecution presented evidence that appellant did not come forward to make a statement to the police until nearly two months after the incident, even though he was aware that the police were looking for him. The evidence elicited by the state was permissible because it was relevant to prove that appellant was attempting to evade the police. Appellant's third and fourth assignments of error have no merit.

(Exhibit 15 at pp. 9-10). Clearly, this evidence was relevant and the trial court did not err by permitting the prosecution to pursue this line of questioning.

Respondent submits that petitioner's *third ground for relief* is without merit and should be denied.

E. Jury Instructions

Petitioner's *fourth, fifth, sixth, seventh, and eighth grounds for relief* each allege that the trial court erred when instructing the jury prior to deliberations. (Doc. 1, Petition at pp. 6 & 6A). The respective claims were raised unsuccessfully as the fifth through ninth assignments of error on direct appeal to the state appellate court and the fifth through ninth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that these claims are without merit, as well as being non-cognizable on habeas review, and should therefore be denied.

Alleged errors in jury instruction normally do not rise to the level of federal constitutional violations. *See Engle v. Isaac*, 456 U.S. 107 (1982); *Turoso v. Cleveland Municipal Court*, 674 F.2d 486 (6th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979); *Weston v. Rose*, 527 F.2d 524 (6th Cir. 1975). The petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973),

quoted in *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Thus, in order to warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson*, 431 U.S. at 154; *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986); *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied* 118 S. Ct. 1547 (1998). Finally, if an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury applied the instruction improperly. *Estelle*, 502 U.S. at 72-73 n.4; *Austin*, 126 F.3d at 846.

The question whether jury instructions deprived a petitioner of due process or of some other constitutional rights is a mixed question of law and fact. Thus, under the new standards of review set forth in 28 U.S.C. § 2254(d)(1), a writ of habeas corpus may be issued only where the court finds that the state court decision involved an unreasonable application of clearly established federal law as determined by the Supreme Court. A state court application of law to facts is unreasonable only if it is so clearly incorrect that it would not be debatable among reasonable jurists. *Lindh v. Murphy*, 96 F.3d 856, 869-70 (7th Cir. 1996) (en banc), *reversed on other grounds*, 117 S. Ct. 2059 (1997).

As his *fourth ground for relief*, Petitioner maintains that evidence of the co-defendant's conviction for the same offense left the jury with the obvious inference that because the co-defendant had been convicted of murder, that Petitioner, being prosecuted as his aider and abettor, must also be guilty. The state appellate court's review of this claim revealed that defense counsel "opened the door" by inquiring about prior convictions. Only upon re-cross examination, did the State, pursuant to Evid. R. 609, question the co-defendant about the murder conviction, which he failed to mention when responding to defense counsel's initial inquiry about prior convic-

tions. (Exhibit 15 at pp. 10-11; *See*, Transcript Vol. I at pp. 140, 148-50, 15152). Finding the claim to be without merit, the state appellate court concluded that "[i]t is well established that '[a] party cannot take advantage of an error he invited or induced.' *State v. Seiber*, 56 Ohio St.3d 4, 17 (1990)." (Exhibit 15 at p. 11).

As his *fifth ground for relief*, Petitioner argues that the trial court erred by not instructing the jury on the lesser-included offense of assault. In essence, Petitioner contends that while he admittedly kicked the victim, there was no evidence that this was the fatal blow. However, Petitioner was charged and convicted as an accomplice in the commission of felony-murder, pursuant to O.R.C. § 2903.02(B). The theory of the State's case was that Petitioner aided and abetted Richard Hayden, the principal offender, in the commission of the underlying felony of felonious assault, which was the proximate cause of the victim's death. Under these circumstances, the state appellate court properly concluded that it is irrelevant "whether or not Petitioner administered the actual blow that caused the victim's death." (Exhibit 15 at p. 12). Respondent submits that an instruction on the lesser-included offense of misdemeanor assault was not warranted.

As his *sixth ground for relief*, Petitioner claims that the trial court improperly informed the jury regarding a presumption of aiding and abetting. Petitioner takes issue with the following excerpt from the jury charge:

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed.

(Transcript Vol. III at p. 536). The excerpt in question is clearly taken out of context and turns a blind eye to the court's two and one-half page instruction on the concept of aiding and abetting. (*See*, Transcript Vol. III at pp. 534-36). Reviewing this same claim on direct appeal, the state appellate court concluded, as follows:

> Appellant fails to acknowledge that the trial court instructed the jury that 'mere presence is not enough to make [appellant] an accomplice ***.' When the entire jury instruction is considered, it is clear that there was no error in this regard.

(Exhibit 15 at pp. 12-13). Respondent submits that the trial court's instruction was not in error.

As his *seventh ground for relief*, Petitioner claims that the trial court erred by indicating that an "accomplice" had testified, thus implying that Petitioner was an accomplice of the witness. This claim was raised unsuccessfully as the eighth assignment of error on direct appeal in the state appellate court as well as the eight proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Petitioner argued on direct appeal that it was a question of fact for the jury to decide whether or not Richard Hayden was an accomplice. (*See*, Exhibit 13 at pp 19-21). The state appellate court correctly concluded that the trial court was statutorily obliged to give an instruction on the testimony of an accomplice. (*See*, Exhibit 15 at pp. 13-14).

O.R.C. § 2923.03(D) provides:

> If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:
>
> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

The state appellate court concluded that the trial court's failure to refer to the witness as an "alleged" accomplice, if error, was harmless. (Exhibit 15 at p. 14). Respondent submits that the statement and instructions of the trial court, with regard to accomplice testimony, were consistent with the statutory requirement and do not give rise to concerns of fundamental fairness or a violation of due process.

As his *eighth ground for relief*, Petitioner contends that the trial court erred by: (1) failing to instruct the jury on a culpable mental state; and (2) instructing the jury concerning flight. These claims were raised unsuccessfully as the ninth and tenth assignments of error on direct appeal in the state appellate court as well as the ninth and tenth propositions of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19).

Contrary to Petitioner's arguments, both on direct appeal and in the instant petition, the state did not have to prove that he knowingly caused the death of the victim. Having charged Petitioner with felony murder, based on the underlying offense of felonious assault, it was incumbent upon the State to show that Petitioner, as either a principal or an accessory, knowingly caused serious physical harm to the victim, proximately resulting in the victim's death. The state appellate court properly concluded that, "the trial court's jury instruction was proper since the trial court did instruct the jury on *mens rea* for felonious assault." (Exhibit 15 at p. 15).

Petitioner maintains that the trial court erred by instructing the jury on flight as evidence of consciousness of guilt. This procedurally defaulted claim was raised as the tenth assignment of error on direct appeal. (Exhibit 13 at pp. 23-24).

Noting that no contemporaneous objection had been made to the jury charge, the state appellate court proceeded with plain error analysis. Although finding that the trial court erred, the state appellate court concluded, in light of the overwhelming evidence of guilt, that the error was harmless. (Exhibit 15 at pp. 15-16).

In the Sixth Circuit, plain error review by a state appellate court does not open a claim to consideration by a federal habeas court when the state court rests its decision on a procedural bar. *Paprocki v. Foltz*, 869 F.2d. 281, 284-5 (6th Cir. 1989); *see also Amos v. Scott*, 61 F.3d. 333, 342 (5th Cir.) *cert. denied*, 516 U.S. 1005 (1995). Respondent submits that Petitioner's claim regarding the jury instruction on flight is waived for purposes of federal habeas review by reason of procedural default in the state courts. Alternatively, when viewed in the context of the trial as a whole, the instruction in question was not so egregious as to render the entire trial fundamentally unfair.

Respondent submits that the foregoing claims, raised as the *fourth, fifth, sixth, seventh and eighth grounds for relief*, are without merit, as well as being non-cognizable for purposes of habeas review, and should therefore be denied.

F. Prosecutorial Misconduct

As his *ninth ground for relief*, Petitioner alleges that he was denied a fair trial when the prosecutor was permitted to make improper arguments to the jury. (Doc. 1, Petititon at p. 6A). Similar claims were raised unsuccessfully as the eleventh assignment of error on direct appeal to the state appellate court and as the eleventh proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that none of Petitioner's claims of prosecutorial misconduct were so egregious as to render the entire trial fundamentally unfair.

On habeas corpus review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainright*, 477 U.S. 168 (1986) or whether it was "so egregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F. 2d 117 (6th Cir. 1979), *cert. denied*, 444 U.S. 936 (1979); accord *Summitt v. Bordenkircher*, 608 F. 2d 247 (6th Cir. 1979), *aff'd sub nom. Watkins v. Sowders*, 449 U.S. 341 (1981); *Stumbo v. Seabold*, 704 F. 2d 910 (6th Cir. 1983). The federal habeas court must first determine whether the challenged statements were indeed improper. *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999). Upon a finding of such impropriety, the habeas court should next "look to see if they were flagrant and warrant reversal." *United States v. Carroll*, 26 F.3d 1380, 1388 (6th Cir. 1994). Flagrancy is determined by an examination of four factors:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Serra v. Michigan Department of Correction, 4 F.3d 1348, 1355-56 (6th Cir. 1993) (quoting *Angel*, 682 F. 2d at 608); *See also United States v. Carroll, supra; United States v. Francis, supra.* Furthermore, the misconduct must be so gross as to probably prejudice the defendant. *Prichett v. Pitcher*, 117 F. 3d 959, 964 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 572 (1997); *United States v. Ashworth*, 836 F. 2d 260, 267 (6th Cir. 1988).

On direct appeal, Petitioner made specific reference to the prosecutor's objectionable remarks, to wit: (1) Petitioner's failure to turn himself in and make a statement; (2) the

prosecutor stated that Petitioner is guilty; (3) the prosecutor paraphrased anticipated jury instructions for aiding and abetting; (4) the prosecutor maligned defense counsel for his interpretation of the evidence. (Exhibit 13 at pp. 25-27). Following its own review of the prosecutor's remarks, the Ohio Court of Appeals for the Eleventh Appellate District reached the following decision:

> After reviewing the prosecutorial comments of which appellant complains, we cannot conclude that any of them prejudicially affected the substantial right of appellant. The strength of the evidence against appellant and the trivial nature of the prosecutor's comments militate against a conclusion that appellant was prejudiced by any of the prosecutor's arguments. Therefore, appellant's eleventh assignment of error has no merit.

(Exhibit 15 at p. 17). Traditionally, courts have allowed prosecutors wide latitude in closing arguments. A prosecutor's closing argument should not be considered improper unless it is "so agregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher, supra.* The closing argument must be viewed in the broader context of the entire trial, the arguments of both counsel, and the jury instructions given by the trial judge. Finally, and crucially, proof of guilt was overwhelming.

The Petitioner has failed to show that any of the prosecutor's remarks infected the trial with unfairness or was so egregious as to render the resulting conviction a denial of due process. Nor has Petitioner demonstrated that the State court adjudication on this issue resulted in a decision that was contrary to, or involved an unreasonable application of, United States Supreme Court precedent. In view of the reasons stated herein, it is respectfully submitted that Petitioner's *ninth ground for relief* should be denied.

G. Felony-Murder Statute

As his *tenth ground for relief*, Petitioner alleges that he was denied equal protection and due process of law when he was indicted for, and convicted of, murder, which he alleges is the equivalent of involuntary manslaughter. (Doc. 1, Petition at p. 6A). Similar claims were raised unsuccessfully as the twelfth assignment of error on direct appeal to the state appellate court and the twelfth proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). In essence, Petitioner challenges the constitutionality of Ohio's statutory scheme for the offense of felony murder, because it alleviates the State's burden of proving any culpable mental state and requires harsher punishment for conduct that would otherwise constitute involuntary manslaughter. Respondent submits that that this claim is without merit and should therefore be denied.

O.R.C. § 2903.02(B) provides that:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

To be convicted of felony-murder, under O.R.C. § 2903.02(B), one must have committed or attempted to commit an offense of violence that is a felony of the first or second degree. Involuntary manslaughter, on the other hand, only requires that the offender commit or attempt to commit a felony. *See*, O.R.C. § 2903.04. Respondent submits that the two offenses are easily distinguished and that the disparate penalties are justified. Petitioner's argument to the contrary is without merit.

On direct appeal, the Eleventh District Court of Appeals held that Ohio's felony murder statute "does not relieve the State of the burden of proving *mens rea* because the intent to

kill is conclusively presumed so long as the State proves the required intent to commit the underlying felony." (Exhibit 15 at p. 18). The state appellate court concluded that Petitioner's due process rights were not violated as the State satisfied the *mens rea* requirement by proving that Petitioner aided and abetted in the commission of the underlying offense of felonious assault. *Id.* The United States Supreme Court has definitively stated that, "prosecutors do not need to prove a culpable mental state with respect to the murder because intent to kill is conclusively presumed if the State proves intent to commit the underlying felony." *Hopkins v. Reeves*, 524 U.S. 88, 91-92 (1998). (Citations omitted).

Petitioner also argued on direct appeal that O.R.C. § 2903.02(B) is unconstitutional in that it creates two classes of individuals who may be convicted of murder, one who acts "purposely" and another who must cause the death of another in the commission, or attempted commission, of a specified act of violence. (Exhibit 13 at p. 30). The state appellate court concluded that O.R.C. § 2903.02(B) does not violate the equal protection clause as no suspect class or fundamental right is involved. Additionally, the state appellate court held that the statute, "which severely punishes offenders whose commission or attempted commission of first or second degree felonies of violence results in death of their victims, bears a rational relationship to the government's legitimate interest of protecting the safety of its citizens." (Exhibit 15 at pp. 18-19).

The federal Constitution does not prohibit states from enacting felony-murder statutes. In fact, the United States Supreme Court has stated "[t]hat States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978). Further, "[n]othing in the United States Constitution deprives legislatures of the power to impose

upon those who kill their victims in the course of inherently dangerous felonies the same sanctions they choose for those who kill their victims after meditation sufficient to satisfy the jurisdiction's definition of first-degree murder." *People of Guam v. Root*, 524 F.2d 195, 197 (9th Cir. 1975).

Respondent submits that Petitioner's *tenth ground for relief* is without merit and should, therefore, be denied.

H. Sufficiency of the Evidence

As his *eleventh ground for relief*, Petitioner contends that his conviction for felony-murder, as an aider and abettor, is not supported by sufficient evidence. (Doc. 1, Petition at p. 6A). Similar claims were raised as the thirteenth assignment of error on direct appeal to the state appellate court and the thirteenth proposition of law in support of jurisdiction in the Ohio Supreme Court. (Exhibits 13 & 19). Respondent submits that Petitioner's claim is without merit and should be denied.

An allegation that the verdict was entered upon insufficient evidence states a claim under the due process clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979); *In re Winship*, 397 U.S. 358 (1970). On federal habeas corpus review, the same standard of review for the sufficiency of the evidence applies as on direct appeal. *Mikes v. Borg*, 947 F.2d 353, 356 n.5 (9th Cir. 1991). In other words, the petitioner is entitled to relief only if it is found "that upon the record of evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324; *State of Ohio v. Jenks* (1991), 61 Ohio St. 3d 259, 274, 574 N.E.2d 492, 504. On federal habeas review, it is not required that all possible interpretations of the evidence except guilt beyond a reasonable doubt be ruled out and the reviewing court need not be convinced of the defendant's guilt beyond a reasonable

doubt. *Scott v. Perini*, 662 F.2d 428, 431 (6th Cir. 1981), *cert. denied*, 456 U.S. 909 (1982); *Delk v. Atkinson*, 665 F.2d 90, 100 (6th Cir. 1981) (holding that the Fourteenth Amendment imposes "no requirement that all other interpretations of the evidence except guilt of the defendant be ruled out").

The evidence is to be viewed in the light most favorable to the government, and every reasonable inference from the evidence presented must be drawn in favor of the prosecution. *Jackson*, at 319; *United States v. Strong*, 702 F.2d 97, 99-100 (6th Cir. 1983); *Fuller v. Anderson*, 662 F.2d 420, 423 (6th Cir. 1981), *cert. denied*, 455 U.S. 1028 (1982). Before the state courts, any conflicting inferences arising from the record, including credibility conflicts, must be resolved in favor of the state. *Walker v. Engle*, 703 F.2d 959, 969 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983). However, on habeas review, the District Court cannot weigh the credibility of the witnesses. *Walker v. Engle*, 703 F.2d at 970. Nor is the District Court permitted to overturn a conviction merely because it would have acquitted had it acted as the finder of fact. *Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985); *Walker*, 703 F.2d at 969.

The Sixth Circuit has held that in reviewing a motion for acquittal based on insufficient evidence, the court must decide if there was sufficient basis for the jury to make its decision and great deference must be given to the decision of the trier of fact. *United States v. Collon*, 426 F.2d 939, 942 (6th Cir. 1970); *accord United States v. Prieur*, 429 F.2d 1237, 1238 (6th Cir. 1970). State court findings of fact, including summaries by the court, are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. § 2254(d); *Marshall v. Lonberger*, 459 U.S. 422, 435 (1983); *Sumner v. Mata*, 449 U.S. 539 (1981), *reaffirmed*, 455 U.S. 591 (1982). Also, it is the obligation of the federal courts to accept as valid a state court's interpretation under state law of the statutes and rules of practice of that state.

Duffel v. Dutton, 785 F.2d 131, 133 (6th Cir. 1986). The question of whether evidence is sufficient to support a conviction is a mixed question of law and fact. 28 U.S.C. § 2254(d). A state court application of law to facts is unreasonable only if it is so clearly incorrect that it would not be debatable among reasonable jurists. *Lindh v. Murphy*, 96 F.3d 856, 869-70 (7th Cir. 1996)(en banc), *reversed on other grounds*, 117 S. Ct. 2059 (1997).

Ohio's felony-murder statute requires that the underlying offense be *an offense of violence that is a felony of the first or second degree. See*, O.R.C. § 2903.02(B). On direct appeal, Petitioner initially argued that the felony-murder statute should not apply to him because he was charged with an *attempt* to commit felonious assault, which is only a felony of the third degree. In this regard, the state appellate court held, as follows:

> Under the plain language of the statute, an attempt to commit a felony of the second degree that proximately results in the death of another qualifies an offender for the offense of felony murder. Furthermore, appellant was convicted of aiding and abetting in a felonious assault that proximately resulted in the death of another; therefore, the charge of felony murder was applicable to appellant.

(Exhibit 15 at p. 19). Not only is Petitioner's initial claim factually incorrect but also, it blatantly misconstrues the language of the statute.

Further, Petitioner maintained on direct appeal that the State presented insufficient evidence to prove that he aided and abetted the principal offender because he merely kicked the victim and was in the car at the time that the fatal blows were administered. Having stated the applicable legal standard, and upon review of the evidence, the state appellate court concluded that the trial court properly denied the

defendant's motion for acquittal "because the jury could have found that the essential elements of aiding and abetting in the offense of felony murder were proved beyond a reasonable doubt." (Exhibit 15 at p. 21). The state appellate court referred to the following evidence in support of the conviction:

> The State presented evidence that appellant aided and abetted Hayden in committing the felonious assault on Olie Gipson. Richard Hayden testified that appellant threw the first punch at Gipson, which caused him to flinch forward and then Damon Anderson punched him twice. Barbara Adeyemi testified that appellant and Anderson continuously beat Gipson by stepping on him and kicking him while Hayden was stomping on his head.

(Exhibit 15 at p. 22). Viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have concluded that Petitioner was guilty of aiding and abetting in a felonious assault that proximately resulted in the death of Olie Gipson. *Jackson, supra.*

Petitioner fails to show that the state appellate court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or an unreasonable determination of facts, which would justify granting habeas relief. *Harris v. Stovall, supra.* Respondent submits that Petitioner's *eleventh ground for relief* is without merit and should, therefore, be denied.

VIII. CERTIFICATE OF APPEALABILITY

> Petitioner has failed to raise issues, which have substantial merit, that are worthy of further consideration, and on which reasonable jurists could differ. Therefore, a certificate of appealability should not issue on any ground asserted in this habeas petition.

District courts have the power to issue certificates of appealability under the AEDPA in Section 2254 cases. *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc). Likewise, district courts are to be the initial decision-makers on certificates of appealability under Section 2255. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir.) (adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997)). Under Rule 10 of the Rules Governing Section 2254 Proceedings, the issuance or denial of a certificate of probable cause may be determined by a United States Magistrate Judge.

28 U.S.C. § 2253 as amended by AEDPA, provides in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Thus, a person in custody upon a state conviction seeking to appeal an adverse ruling on a petition for writ of habeas corpus in the district court must obtain a certificate of appealability, (formerly called a certificate of probable cause), before proceeding. 28 U.S.C. § 2253; Fed. R. App. P. 22. Respondent submits that Petitioner has not and cannot make a

substantial showing of the denial of a constitutional right. Therefore, Respondent submits that a certificate of appealability should not issue on any issue presented in the instant petition.

IX. CONCLUSION

Respondent submits that Petitioner's state law claims should be dismissed as non-cognizable grounds for federal habeas relief. Respondent further submits that those claims presented as federal questions or, which give rise to concerns of due process and fundamental fairness, should be denied as each has been found to be without merit in the state courts, pursuant to a reasonable application of clearly established federal law. Additionally, Respondent submits that a certificate of appealability should not be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Answer/Return of Writ* was filed electronically and forwarded to Counsel for Petitioner, Paul A. Mancino, Jr., Suite 1016, 75 Public Square, Cleveland, Ohio 44113 by U.S. mail, postage pre-paid this 24th day of October, 2002.

s/BRUCE D. HORRIGAN
BRUCE D. HORRIGAN
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02CV1520
(JUDGE DONALD C. NUGENT
MAGISTRATE JUDGE JACK B. STREEPY

KEITH BOWLES,
Petitioner,

vs.

HARRY RUSSELL, Warden,
Respondent.

TRAVERSE AND BRIEF OF PETITIONER

Now comes petitioner, Keith Bowles, and for his traverse and brief in response to the return of writ filed by respondent and denies all new matters contained therein except that which may constitute admissions.

Petitioner is before this court seeking a writ of habeas corpus with respect to the judgment and sentence entered by the Court of Common Pleas of Lake County in which petitioner was sentenced to a term of imprisonment of fifteen (15) years to life for being convicted of murder in violation of §2903.02 of the Ohio Revised Code. In support of his petition petitioner advanced several grounds for relief

I

Petitioner, has asserted he was denied a fair and impartial jury. No black jurors were summoned to appear as jurors at petitioner's trial who is a black or African-American. In addition, jurors who were summoned for the trial had recent exposure to a trial of a co-defendant and had information from that trial and thus could not be fair and impartial.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S.333 (1966).

In this case petitioner was entitled to a new trial.

This issue was considered in *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001). In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

Petitioner contended that he was denied a fair jury. There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr.Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U. S .522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev. Code §737.05.

II

Petitioner contends he was denied a fair trial when the court called a co-defendant, Richard D. Hayden as a court's witness. There was no basis for this and this unduly enhanced the credibility of Hayden.

Over objection, Richard T. Hayden was called as a court's witness. Richard Hayden was a principal offender who had been previously convicted. There is no basis for calling him as a court's witness. The prosecution had not even spoken to Richard Hayden. (Tr.68-70). Moreover, the prosecution had in its possession Richard Hayden's statements to the police along with his trial testimony. (Tr.71). There was no indication that Richard Hayden would not testify in accordance with his previous declarations or would recant, become hostile or refuse to testify. The calling of Richard T. Hayden as a court's witness not only violates the Ohio Rules of Evidence but deprived defendant of a fair trial and due process of law guaranteed by Section 10, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Jamal Russell was also improperly questioned about his statements and answered a question by stating that his police statement so said as he testified to. (Tr.171).

Petitioner was prejudiced by this tactic. The prosecutor, by asking leading questions, referred to his statement and alluded to all-encompassing statements such as "everyone" wanting to fight and get revenge. (Tr.87). This was referred to as "everybody" and "all". (Tr.88). The prosecutor then related to Hayden his statements to the police about hitting Gipson. (Tr.101-02). Petitioner was just lumped together as "the three of you." (Tr.111).

This tactic was repeated when the prosecutor told Hayden what he purportedly told the police. He simply made references to the "three of you." (Tr. 143-44, 4x), or "all of you"

Evid R.607 also states that a party calling a witness may attack the witness' credibility through use of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This rule was established to negate the strategy of a party calling a known adverse witness simply to

get a prior inconsistent statement into evidence by way of impeachment and "thus doing indirectly what he could not have done directly." This is exactly what the state did in this case. The state should not have been permitted to do under one rule of evidence what another rule of evidence expressly prohibits. Fundamental fairness dictates that the state play by the rules. Here, the state used the court as a straw man to get inadmissible evidence that in front of the jury to bolster its case. It is within the discretion of the trial court to call a witness as the court's witness in the interest of justice and the ascertainment of the truth. However, the court's role is not to be a tool of the prosecutor to reveal the state's version of the truth. *United States v. Wilson*, 447 F.2d 1, 8-9 (9th Cir.1971).

III

Petitioner contends he was denied a fair trial when the court permitted questioning of petitioner when he testified in own defense and later commented on the fact that petitioner did not come forward voluntarily to make a statement to the police. Petitioner's right to a fair trial was further compromised and compounded when the court permitted evidence to be offered concerning alleged efforts made by the police to contact petitioner for a statement.

Petitioner testified in his own behalf. On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.43 5).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Minor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be constitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted

these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir.2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which

he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

IV

Petitioner contends he was denied a fair trial when the prosecutor was permitted to elicit from a co-defendant that he had been convicted of the offense of murder and the court did not give any limiting instruction to the jury.

The state improperly called Richard T. Hayden and convinced the court to call him as a court's witness. By this ruse the prosecutor was able to place before the jury that Richard T. Hayden had been convicted of Gipson's murder. (Tr 151-52). This left the jury with the obvious inference that since Hayden was convicted of murder petitioner was prosecuted as an aider and abettor to Hayden that petitioner was guilty. No cautionary instruction was given by the court. The courts have ruled that if there is a guilty plea or a conviction of one associated with the same offense on trial that the jury must be instructed not to consider that plea. The court overruled petitioner's objections to this line of inquiry and permitted the witness to answer. (Tr. 151-52). Thus, the jury heard the principal being guilty and petitioner, being an aider and abettor to the principal Richard Hayden that he was guilty in this regard. Although Hayden did not plea guilty he was found guilty and the same rules as to a guilty plea is applicable here. "Evidence of . . . guilty pleas is a amenable misuse. Without instruction, it is possible the jury could use the pleas as evidence of . . . guilt. This danger may be averted only by adequate cautionary instructions. . . ." *United States v. Rivera-Santiago*, 872 F.2d 1073, 1084 (1989). Such a limitation would have been appropriate ". . . because ad-

mission of a co-defendant's guilty plea can be extremely prejudicial to the defendant given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty." *Government of Virgin Islands v. Mujahid*, 990 F.2d 111, 116 (3d Cir.1993). See *United States v. Prawl*, 168 F.3d 622 (2d Cir.1999).

V

Petitioner contends he was denied due process of law and his right to present a defense when the court would not instruct the jury on any lesser included offense including the offense of assault. Petitioner testified to his version of the offense and, at most, committed an assault. Petitioner was clearly entitled to such an instruction.

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr. 244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr.466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene

the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

In this case petitioner was entitled to such an instruction. There was ample evidence that petitioner was only guilty of an assault and not of murder. Where the record presents evidence concerning the existence of a lesser offense this the court is duty bound to so instruct the jury.

In *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E. 828, 831 (1991), the following was stated:

> It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St. 2d 287, 75 O.O. 2d 331, 348 N.E. 2d 135. However, the corollary of this maxim is also true. "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the fact in the case and reasonable

minds might reach the conclusion sought by the instruction." Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991) 860, Section 36:2. See, also *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54, 57 O.O. 2d 213, 275 N.E. 2d 340, at the syllabus: "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n]* * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction."

An instruction on lesser included offenses is required if the jury could reasonably find against the state on any element of the greater offense. This rule was set forth as follows:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.
>
> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to the defendant. *State v. Wilkins*, 64 Ohio St. 2d 283, 388, 415 N.E. 2d 303, 308 (1980). Accord, *State v. Davis*, 6 Ohio St. 3d 91, 95, 451 N.E. 2d 776 (1983); *State v. Solomon*, 66 Ohio St. 2d 214, 421 N.E. 2d 139 (1981).

The Due Process Clause of the Fourteenth Amendment requires that lesser included offense: be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208, 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). See *Sansone v. United States*, 380 U.S. 343, 349 (1965).

VI

Petitioner contends he was denied due process of law when the court improperly informed the jury concerning a presumption given to the state in proving petitioner was an alleged aider and abettor.

In instructing the jury on aiding and abetting the jury was told that:

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

First, direct evidence was offered on this proposition. The Supreme Court has ruled that a jury should not be instructed on a presumption when evidence is offered on the subject. In *Forbes v. Midwest Air Charter Inc.*, 86 Ohio St.3d 83, 711 N.E.2d 997 (1999), the court informed the jury about a statutory presumption even though evidence had been offered. The court reversed because ". . . the jury in this case should not have been instructed as to the . . . presumption . . . because 'evidence tending to prove a fact . . . , which for procedural purposes would be presumed in the absence of such evidence,' was presented. . . ." 86 Ohio St.3d at 86-87, 711 N.E.2d at 999.

Second, this is unconstitutional because it is arbitrary and unreasonable. There is no rational connection between the fact proven and the fact presumed. Under the instruction the jury could conclude that defendant was guilty as an aider and abetter merely from his presence, companionship and conduct before or after the offense is committed. This is an unconstitutional presumption. *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463, 467 (1943); *State v. Swanson*, 52 Ohio App.3d 78, 557 N.E.2d 848 (1989).

Third, this was an improper statement of the law. Even if the evidence of the prosecution is believed, "the mere

presence of an accused at or near the scene of the crime does not conclusively establish that the accused committed the crime. . . ." *State v. Weber*, 124 Ohio App. 3d 451, 463, 706 N.E.2d 427, 435 (1997). This is instruction is misleading because it goes to aiding and abetting. This evidence occurs "after the event." Evidence of aiding and abetting must precede the occurrence. Thus:

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed. *State v. Starr*, 24 Ohio App.2d 56, 263 N.E.2d 572 (1970).

Further, in *State v. Sims*, 10 Ohio App. 3d 56, 64, 460 N.E. 2d 672, 676 (1983), the court stated that:

> A frequently quoted definition of "aiding and abetting" is contained in *Smith v. State* (1931), 41 Ohio App. 64, 67-68. 179 N.E. 696:
>
> "In the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed" *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476.

Thus, this is a misstatement of the law because the fact that petitioner may have been with Hayden afterwards was allowed to be used by the jury to conclude that petitioner aided and abetted Hayden.

Fourth, such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Fifth, there is no statutory basis for giving such an instruction whether the presumption be deemed permissive or mandatory. This presumption is no where spelled out in the Ohio Criminal Code.

In Ohio the legislature is the only body that has authority to define crimes. Since this is not set forth in any statute, the court may not usurp a legislative function and instruct the jury with reference to such a presumption. *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.2d 451, 455-56, 715 N.E.2d 1062, 1071 (1999).

Thus, a court has no authority to give a jury instruction concerning a presumption which arises from a judicial decision. If any presumption exists in these circumstances it has to be the result of an act of the legislature and not the court. Even a presumption under Rule 301 of the Ohio Rules of Evidence it refers only to civil actions and presumptions provided for by the General Assembly.

VII

Petitioner contends he was denied a fair trial when the court, in its jury instructions, stated that Richard Hayden was an accomplice. This was a question of fact for the jury and the trial judge usurped a jury function by stating, as a matter of law, that Richard Hayden was an accomplice.

The court instructed that "Now we had an accomplice testify in this case." (Tr. 537). This was objected to by petitioner. (Tr.557-558). This was an unconstitutional comment on the evidence. Whether Richard T. Hayden was or was not an accomplice is a fact question. By designating Richard T. Hayden as "accomplice" the court in effect informed that jury that Hayden was an accomplice of defendant. There is no other way in which this statement could be taken. This denied petitioner a fair trial and invaded the province of the jury.

A fundamental constitutional right is violated because:

> The Constitution gives a criminal defendant the right to have the jury determined, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. . . . *United States v. Gaudin*, 515 U.S.506, 522-23 (1995).
>
> A defendant charged with a serious crime has the right to have the jury determine his guilt or innocence, . . . and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each and every element of the crime under the proper standard of proof. . . . Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from a failure to instruct it to find an element of the crime. . . . *Cabana v. Bullock*, 474 U.S.376, 384-85 (1986).

VIII

Petitioner contends he was denied due process of law and a fair trial when the court would not instruct that the state had prove a culpable mental state in order to convict petitioner. Petitioner, who was convicted of the offense of murder and sentenced to a term of imprisonment of fifteen (15) years to life certainly had the right to require the state to prove a culpable mental state in order to convict petitioner.

Petitioner requested that the jury be instructed that causing the death of another must be done knowingly, (Tr.441). The court refused to give such an instruction.

The Ohio Supreme Court has ruled that "guilty knowledge is an essential ingredient of crime. . . ." *State v. Cameron*, 97 Ohio St. 50, 60, 109 N.E.584, 589 (1914).

Thus, criminal liability must be based on more than what is required for liability for negligence in a civil action. The instruction given by the court did not require such proof.

Where criminal liability, and especially felony liability is involved, the state must comport with constitutional guidelines. Thus, actual knowledge is required. Otherwise, the statute would be unconstitutional. *United States v. Wolff*, 785 F.2d 1121 (6th Cir.1985).

Further, the instructions were improper and denied petitioner a fair trial when the court ruled that the court's instruction on flight was harmless error. The Court of Appeals undertook an improper analysis of the harmless error rule where constitutional error was involved. The Court of Appeals did not properly apply the constitutional harmless error analysis.

Constitutional error can be said to be harmless only if "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Second, in *Chapman*, the court ruled that "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

This instruction certainly cannot be deemed harmless. The prosecutor argued

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing rook place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—
>
> MR MANCINO: Objection.
> THE COURT: Overruled. (Tr.483 -84).

Further this was compounded when the prosecutor stated that petitioner was guilty. (Tr.486). This has been held to be

improper argument. *United States v. Fullerton*, 187 F.3d 587, 592 (6th Cir.1999).

The court instructed the jury on flight:

> In this case there has been evidence presented that the defendant, Keith Bowles, fled from the Argonne Arms, the vicinity of the alleged crime, and then remained at large. In regarding this evidence you are instructed that flight in and of itself does not raise a presumption of guilt but it may tend to show consciousness of guilt or a guilty conscience with the crime.
>
> If, therefore, you find that the defendant did flee from the Argonne Arms, the vicinity of the alleged crime, and then remained at large, you may consider these circumstances in the case in determining the guilt or innocence of the defendant. (Tr.536-37).

A flight instruction was inappropriate because petitioner had no other means to get from Painesville to Cleveland, (Tr. 120). Jamal Russell drove the car with petitioner in the rear seat. (Tr.136). The police even waived them on to leave the area. (Tr.137). Afterwards Jamal Russell switched seats with Hayden driving. (Tr.138). The officer told all to leave and defendant was driven back to Cleveland. (Tr.174).

IX

Petitioner contends he was denied a fair trial by reason of improper prosecutorial argument. The singular, if not cumulative effect of these arguments was deprive petitioner a fair trial.

A number of improper statements were made by the prosecutor concerning this case including statements as to what constitutes evidence. *Kincaid v. Sparkman*, 175 F.3d 444 (6th Cir. 1999).

1. The prosecutor made much of the fact that petitioner did not come in and talk to the police. As stated previously

even if defendant did turn himself in he certainly did not have to make a statement.

The prosecutor argued that "Why do you think the other people came in, hey, I just kicked the dude, I didn't shoot no one?" (Tr.479).

Even though an objection was sustained the prosecutor went on to argue that this showed a consciousness of guilt.

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing took place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—
>
> MR. MANCINO: Objection.
> THE COURT: Overruled. (Tr.483-84).

Later, the following argument was made:

> Within the week Mr. Russell came in and talked, Mr. Anderson came in and talked, Mr. Hayden came in and talked, Mr. Bowles didn't come in. Mr. Bowles went out and he had breakfast that morning not far from Metro-Health Center according to his testimony, Ollie Gipson died at 9:25 a.m., on the 23rdof August—
>
> MR MANCINO: Objection.
> MR. HACKMAN: —in the City of Cleveland—
> THE COURT: Overruled. (Tr.486)

These arguments equate flight with exercising a constitutional right against self-incrimination. This was improper argument. *Minor v. Black*, 527 F.2d 1 (6th Cir.1975). Petitioner was denied a fair trial. *Martin v. Parker*, 11 F.3d 613

(6th Cir.1994); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir.1990).

2. The prosecutor improperly stated that petitioner was guilty:

> Ladies and gentlemen, Mr. Bowles is guilty. (Tr.486).

As stated in *State v. Cloud*, 112 Ohio App.208, 215, 168 N.E.2d 761, 766 (1960), "The ruled of law in Ohio is well settled that a prosecutor commits reversible error in stating in argument to a jury that in his personal opinion a defendant in a criminal case is guilty of the crime charged." *State v. Thayer*, 124 Ohio St.1, 176 N.E.656 (1931) at syllabus.

Improper statements concerning the evidence, even if unobjected to, are reversible error. *State v. LaFreniere*, 85 Ohio App.3d 840, 853-54, 621 N.E.2d 812, 821-22 (1993).

3. The prosecutor further improperly argued as to what the law was and what had to be proven in the case. First the prosecutor stated that the case had nothing to do with petitioner intending to kill anyone. (Tr.474). Then prosecutor improperly stated constitutes aiding and abetting "You will hear the Judge instruct you that one who aids and abets another is just as guilty . . . as the principal offender. You will be instructed that active participation, however slight, is aiding and abetting another person. (Tr.475).

This is an improper statement of aiding and abetting, which oversimplifies and misstates the law.

Thereafter, the prosecutor stated that they did not have to prove that the three of them specifically intended to cause serious physical harm. (Tr.505-06).

4. The prosecutor maligned defense counsel. The prosecutor attempted to give his opinion as to what statements of Richard Hayden were the truth.

Richard Hayden, what he's trying to tell you to listen to and told you Mr. Bowles kicked him one time. Now remember Mr. Hayden's testimony Mr. Hayden every time in his prior statement that he made, prior statement of his was all, all three of us were kicking, then Mr. Mancino put the words his mouth about one kick and he would agree to that.

MR. MANCINO: Objection.
THE COURT: Overruled. (Tr. 514)

Thereafter, the following was stated:

But Barbara Adeyemi, Mr. Mancino talks about her statement to the police and he's trying to say to you here that she never told the police and he's trying to say to you here that she never told the police the three of them were beating this man, that's not true.

MR. MANCINO: Objection.
MR. CULOTTA: That is not true—
TILE COURT: Overruled.
MR. CULOTTA:—and not what she said. In fact the statement he was reading to you it starts off one of the three beaters.
MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.515)

This denigrates defense counsel and is improper. *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203, 207 (1993). ("It is improper to denigrate defense counsel in the jury's presence for making objections. . . .").

X

Petitioner contends that he was denied due process of law and equal protection of the law when he convicted of an offense of murder which, in the Ohio statutory scheme was equivalent of involuntary manslaughter. Murder which carried a penalty of fifteen (15) years to life contained essentially

the same elements of involuntary manslaughter which carried a maximum sentence often (10) years. However, imposing the same elements resulted in petitioner being sentenced to fifteen (15) years to life thus violated his right of due process and equal protection of the law.

Petitioner was indicted on September 4, 1998 under the newly defined form of murder. The indictment alleged as follows:

> On or about the 23rd day of August, 1998, at the City of Painesville, Lake County, Ohio, one KEITH BOWLES aka "K.B.", did cause the death of Ollie T. Gipson as a proximate result of KEITH BOWLES aka "KB." committing or attempting to commit an offense of violence that is a felony of the first or second degree, to-wit: Felonious Assault, in violation of Section 2903.11 of the Revised Code.

This version of defining murder is contained in §2903.02(B)-(C) of the Ohio Revised Code:

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.
>
> (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

This statute is unconstitutional. It constitutes a denial of equal protection of law and is arbitrary, capricious and unreasonable.

In effect, the Ohio General Assembly has retained the traditional definition of murder which is to purposely cause

the death of another while also calling it murder which is the substantial equivalent of involuntary manslaughter.

This statue is unreasonable and arbitrary because to commit murder while in the commission of certain specified felonies does not even require a culpable mental state. Moreover, there must be no proof that the person purposely caused the death of another. Murder has always been, in Ohio history, an intentional act. Since murder carries a penalty of fifteen (15) years to life, involuntary manslaughter as either a felony of the first degree or third degree, only carries a maximum sentence of ten (10) years. Thus, by committing the very same act, different penalties are prescribed. The statute is unconstitutional because, in one form of murder the act be done "purposely", and the other eliminates of any culpable mental state. Disparate elements and penalties for the same act result.

It is hard to conceive that a murder could be committed without also committing some underlying felony. The new murder statute states that the act must be committed while committing or attempting to commit an offense of violence which is a felony of the first or second degree and which is not a violation of §2903.03 or §2903.04 of the Ohio Revised Code. This makes little sense. Without requiring a culpable mental state of purposely or a purpose to cause the death of another the new murder statute cannot pass constitutional muster.

Thus, what Ohio Revised Code §2903.02(B)-(C) does is to create two classifications of murder. However, there are less elements and an absence of a culpable mental state in murder under the newly enacted version contained in §2903.02(B) of the Ohio Revised Code. Given that there is no culpable mental state and no requirement that the act be done purposely and the same penalty result reeks of fundamental unfairness. It treats persons similarly situated completely

different and imposes a greater penalty for an act which would essentially constitute involuntary manslaughter.

The statute requires that there be an "offense of violence." That term is defined broadly in §2901.01(A)(9) of the Ohio Revised Code. There are approximately thirty-two (32) specific statutes in Ohio which could constitute offenses of violence. What is particularly revealing is that an offense of violence must be ". . . committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons; . . ." Thus, by definition an "offense of violence must be committed purposely or knowingly". Yet in this new version the death need not be caused either "purposely" and "knowingly" to constitute the offense of murder.

This is not just an example of poor legislative draftsmanship but evidences a statute that lacks required constitutional uniformity to satisfy the due process clause or the equal protection clauses of the Ohio and Federal Constitutions. It creates two classes of individuals who may be convicted of murder one whom must cause the death "purposely" and in the other one only must cause the death of another while committing or attempting to commit a specified offense of violence.

The Ohio Supreme Court has stated that the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution require ". . . that all similarly situated individuals be treated in a similar manner. . . . In other words, laws are to operate equally upon persons who are identified in the same class." *State ex rel. Patterson v. Industrial Comm'n.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008, 1011 (1996).

The Ohio Supreme Court has stated that a law, constitutional on its face, can be unconstitutional in its application:

> "[D]iscrimination against individuals or groups is sometimes an inevitable result of the operation of a statute." *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d, 443, 446, 613 N.E.2d 574, 577. "The mere fact that a statute discriminates does not mean that the statute must unconstitutional." *Id.* at 446-447, 613 N.E.2d at 577.

In determining whether a statute violates equal protection, we examine the class distinction dawn to decide if a suspect class or fundamental right is involved in order to determine what level of scrutiny to apply. *Id.* at 447, 613 N.E.2d at 577. The right to sue a political subdivision has been held not be a fundamental right. *Fabrey, supra*, 70 Ohio St.3d at 353, 639 N.E.2d at 33. Moreover, this case does not involve a suspect class which has been traditionally defined as one involving race, national origin, religion, or sex. *Id.* Therefore, rather than apply heightened scrutiny, we review the statue accordingly to the "rational basis" test. Consequently, the statute must be upheld if it bears a rational relationship to a legitimate governmental interest. *Roseman, supra*, 66 Ohio St.3d at 447, 613 N.E.2d at 577. However, a statutory classification will be found to violate equal protection if it treats similarly situated people in a different manner based upon illogical and arbitrary basis. *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 711, 576 N.E.2d 765, 785, citing *Stated v. Buckley* (1968), 16 Ohio St.2d 128, 45 0.0.2d 469, 243 N.E.2d 66 (A.W. Sweeney, J., concurring in part and dissenting in part). *Adamsky v. Buckeye Local School District*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214 (1995).

This statute smacks of fundamental unfairness and is unconstitutional in its application. In cases where the Supreme Court has ruled that statutes which apply differently to persons in similar circumstances are unconstitutional as denying

equal protection of the law. See *Caruso v. Aluminum Co. of America*, 15 Ohio St.3d 306, 473 N.E.2d 818 (1984); *State ex rel. Nytray v. Industrial Comm'n*, 2 Ohio St.3d 173, 443 N.E.2d 962 (1983).

XI

Petitioner contends he was denied due process of law when his conviction was allowed to stand as there was insufficient evidence to convict him of murder.

A.

Petitioner, who was prosecuted in a hybrid fashion as a principal offender and as an aider and abettor, was found guilty. The jury returned a specific finding that defendant was attempting to commit felonious assault.

Recently revised §2903.02(B) of the Ohio Revised Code created a new category of murder as follows:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

Felonious assault is felony of the second degree unless it involves a peace officer. Ohio Rev. Code §2903.11. There is no claim that the deceased in this case was a peace officer.

Thus, the substantive offense of felonious assault would be a felony of the second degree. An attempt to commit felonious assault is a felony of the third degree. Section 2923.02(A) of the Ohio Revised Code provides that "An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. . . ."

Consequently, an attempt to commit felonious assault would be a felony of the third degree and does not qualify as the predicate felony for murder.

This is a criminal statute. As required by §2901.04(A) of the Ohio Revised Code, "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

However, since the underlying offense of felonious assault as applicable to this case was a felony of the second degree, an attempt to commit that felony results in a felony of the third degree. Thus, the murder statute is inapplicable.

Further, the imposition of a term of imprisonment of 15 years to life results in a cruel and unusual punishment under the circumstances of this case. Petitioner was in the vehicle when fatal blows were inflicted by Richard Hayden. Petitioner did not urge, incite, counsel or direct Richard Hayden. Richard Hayden testified that he did this on his own without any participation of any other person. The resulting penalty in this case certainly does not fit the offense and results in a cruel and unusual punishment. The prosecution enhanced an assault, a misdemeanor of the first degree, to the offense of murder. This is clearly unconstitutional.

B.

Richard Hayden testified that defendant just "skimmed" the back of Gipson's head. (Tr.98). Petitioner just "skimmed" Gipson (Tr.100). Afterwards, Damon Anderson (Long) punched Gipson twice in the face. (Tr. 100). Hayden then kicked him. At most, petitioner "probably kicked him once" which was "somewhere down around the legs or something." (Tr.101) Afterward "I kicked him maybe one or twice more." (Tr. 103).

Petitioner had no intention of beating anyone up. He was just a quiet person. (Tr.120-21). Gipson approached the car in a menacing manner when petitioner got out of the car. (Tr.123). Petitioner only "skimmed" Gipson which did no damage. (Tr.125)

After Gipson stumbled back Hayden "grabbed him, threw him down, tripped him down," (Tr.125). Petitioner had nothing to so with getting Gipson to the ground. (Tr.125).

Petitioner did not urge Hayden to do any damage. (Tr.125). Petitioner only kicked Gipson in the legs, (Tr.126), which did no damage. (Tr.127). Petitioner did not urge Anderson to kill Gipson. (Tr.127). Hayden was alone with Gipson and continued to kick him. (Tr.128). Hayden did throw Gipson to the ground. (Tr.129). Petitioner was in the car at this time, (Tr. 129-30), and said nothing to either Hayden or Anderson. (Tr.130). Hayden kicked Gipson straight on and Gipson did not get up. (Tr.131). Hayden said he did not intend to cause the death of Gipson. (Tr.140).

The whole purpose of going to Argonne Arms was to get "Stickman" (Antonio Rymmer) and "kick his ass". (Tr.163-64). Gipson approached the car with his hand in his shirt. (Tr.166, 192).

It was thought that Gipson had a gun. (Tr.167). Petitioner only kicked Gipson. After petitioner got in the car Hayden "stomped on the guy's head three times. . . ." (Tr.168). No one had a gun or weapon. There was no prior plan to beat someone up. (Tr.186)

Russell did not know how Gipson wound up on the ground. (Tr.194). Petitioner only punch Gipson in the case. (Tr.195). Gipson was only kicked in the stomach by petitioner according to Russell. (Tr.196). Petitioner got back into the car when Hayden did this stomping entirely on his own, (Tr. 197), while petitioner is seated in the back seat of the car. (Tr. 198).

Further in this case there is insufficient evidence to prove defendant aided and abetted Richard Hayden. Richard Hayden testified that he inflicted the fatal blows on his own. Petitioner did not in any way participate in that fatal confrontation. It cannot be said as a matter of law that defendant was an aider and abettor in these circumstances.

The appropriate standard to determine whether one may be convicted as an aider and abettor was set forth in the syllabus in *State v. Starr*, 24 Ohio App. 2d 56, 263 N.E. 2d 572 (1970):

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed.

It is apparent from the foregoing that there was insufficient evidence to convict the petitioner of aiding and abetting. It should be noted that under the complicity statute, §2923.03 of the Ohio Revised Code there are four forms of complicity. One of those is soliciting or procuring another to commit the offense. There is no evidence in this record and the petitioner was not charged with soliciting or procuring. It specifically charged with aiding and abetting another in the commission of the offense. Consequently, the conviction in this case violates elementary precepts of due process of law. There was clearly insufficient evidence to permit a rational factfinder to return a verdict of guilty.

A review of the record in this case shows that petitioner's constitutional rights were violated in these proceedings. Petitioner is entitled to an award of writ of habeas corpus.

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SERVICE

A copy of the foregoing Traverse and Brief of Defendant-Appellant has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 2nd day of December, 2002.

/s/ Paul Mancino
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520
Judge Donald C. Nugent
Magistrate Judge Jack B. Streepy

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE

STREEPY, MAG. J.

Keith Bowles (Bowles) has filed a petition for a writ of habeas corpus concerning his felony murder conviction in the Lake County, Ohio, Court of Common Pleas, on March 3, 1999, pursuant to a jury verdict. With a few exceptions, respondent does not contend there has been a procedural default nor does he contend the one year statute of limitations was not met.

On direct appeal, the Ohio Court of Appeals affirmed the conviction pursuant to a written decision. (Respondent's exhibit, RX, 15.) The court made the following findings of fact.

In the early morning of August 22, 1998, Bowles learned that his cousin and others had been jumped and beaten up by a group, one of whom was Antonio Rymmer. Bowles and

three others began looking for Rymmer to "beat him up in revenge for jumping their friends." (*Id.* at 2.) After driving for awhile, they "encountered Ollie Gipson [Gipson] whom they did not know. At that point, . . . [Bowles] and two of the others in the car got out of the car and started to beat Gipson by punching, kicking, and stomping on him. Gipson died as a result of the injuries he sustained in the attack." (*Id.* at 3.)

In his direct appeal, Bowles raised 13 assignments of error alleging a constitutional violation as to each. (RX 13) The state court assignments of error have been raised in this federal case, albeit reduced to 11 grounds.[1]

Review in this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a habeas corpus petition will not be issued concerning any claim which was determined on the merits by a state court decision unless the decision was contrary to, or involved unreasonable application of, clearly established federal law, as determined by the Supreme Court, 28 U.S.C. §2254(d)(1), or the decision of the state court was based on unreasonable determination of the facts in light of the evidence in the state court proceedings, 28 U.S.C. §2254(d)(2), *Lorraine v. Coyle*, 291 F.3d 416, 421-22 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1621 (2003). The decision of a state court is contrary to clearly established law if the court arrives at a conclusion opposite to that reached by the Supreme Court or if the state court decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An unreasonable application occurs when the state court identified the correct principle but unreasonably applied that principle to the facts of the petitioner's case. *Id.*; *Lorraine*, 291 F.3d at 422. A state

[1] Assignments of error three and four have been combined into ground three of the petition, and assignments of error nine and ten have been combined into ground eight of the petition.

court decision is not unreasonable simply if the federal court disagrees with the decision; rather, the federal court must determine the state court decision is an objectively unreasonable application of federal law. *Williams*, 529 U.S. at 410-12. The factual findings by state courts are presumed to be correct. 28 U.S.C. §2254(e) (1); *Lorraine*, 291 F.3d at 422. For the reasons noted *infra*, as to those grounds for which Bowles cites Supreme Court precedent, the state court decision was no' contrary to, or an unreasonable application of, said precedent.

Bowles has the burden of showing that the state's decision is contrary to, or an unreasonable application of, Supreme Court precedent. *Williams v. Matesanz*, 230 F.3d 421, 424-25 (1st Cir. 2000), *overruled on other grounds by Cambridge v. Hall*, 303 F.3d 24, 36-37 (1st Cir. 2002); *Warren v. Miller*, 78 F.Supp.2d 120, 133 (E.D.N.Y. 2000); *Alley v. Bell*, 101 F.Supp.2d 588, 658 (W.D. Tenn. 2000); *Ward v. French*, 989 F.Supp. 752, 763 (E.D.N.C. 1997), *aff'd*, 165 F.3d 22 (4th Cir. 1998), *cert. denied*, 526 U.S. 1124 (1999). Bowles has not cited Supreme Court precedent in support of many of his grounds, thus has not met his burden.

I. Ground One

Ground one alleges denial of a fair and impartial jury because (1) no black jurors were summoned to serve as potential jurors, (2) the prospective jurors had recently been exposed to the trial of Bowles' co-defendant, and (3) one of the jurors should have been excused because he was the brother of the Painesville Chief of Police.[2]

Concerning the absence of black jurors, the appellate court found Bowles had "not demonstrated that representation of African-Americans jury venires is not fair and reasonable in relation to the number of such persons in Lake County.

---

[2] The murder occurred in Painesville, Ohio.

Furthermore, appellant has not presented any evidence from which we can infer that the number of African-Americans included in venires in Lake County is due to systematic exclusion of this racial group in the jury selection process." Thus, a violation of the Sixth Amendment right to have a jury comprised of a fair cross-section was not established. (RX 15 at 6.)

Bowles cites *Taylor v. Louisiana*, 419 U.S. 522 (1975), as refined in *Duren v. Missouri*, 439 U.S. 357 (1979), which held that "systematic exclusion" of women in the jury selection process resulting in jury pools which were not "reasonably representative of the community," denied a defendant his right to have a jury "selected from a fair cross-section of the community." *Duran* at 358-59. The only evidence relied upon by Bowles is that there was no black citizen in the jury venire for his trial. The appellate court determination that this failed to prove the alleged constitutional violation was not an unreasonable application of clearly established federal law.

Next, Bowles contends his case was tried shortly after a shooting "committed by Michael Love, almost simultaneously and at the same location," which "tainted the entire jury pool." The Ohio Court of Appeals found the voir dire of the jury selected for Bowles "reveals that none of the jurors at appellants trial indicated that they had formed an opinion as to appellant's guilt prior to the commencement of trial. We cannot conclude that appellant was denied a fair and impartial jury due to the jurors' exposure to pre-trial publicity." (RX 15 at 6.)

Bowles cites *United States v. Wood*, 299 U.S. 123, 145-46 (1937), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), which, at 351, requires that Bowles must either prove that pretrial publicity caused him to be prejudiced, or that adverse publicity was so significant that it created a probability of prejudice which inherently violated due process. Bowles has

not shown the appellate court's ruling was an unreasonable application of *Sheppard* and *Wood*.

With regard to excusing a juror for cause, Bowles relies only on Ohio law (brief at 3-4) which the appellate court held did not apply to the juror at issue. More to the point, Bowles has not alleged a constitutional violation nor cited a Supreme Court case, thus has not met his burden.

II. Ground Two

Bowles contends he was denied a fair trial when the trial court called one of his co-defendants, Richard Hayden (Hayden), to testify as a court witness. Calling Hayden as a court's witness allegedly violated due process of law.

Hayden was a co-defendant of Bowles who had been previously tried and convicted of the same murder that Bowles was on trial for. The prosecutor asked the judge to call Hayden to testify as a court's witness because counsel for Hayden had indicated he would not cooperate with the prosecutor.

The appellate court concluded there was reasonable justification for the trial court to believe that calling Hayden would benefit the jury in performing its fact finding responsibilities, thus there was no abuse of discretion. (RX 15 at 7-9.)

Bowles does not cite any Supreme Court precedent, thus has not met his burden. Moreover, rulings on evidentiary matters in state court do not constitute grounds for granting a writ of habeas corpus. Even an error in applying a state law regarding admissibility of evidence is usually not cognizable in federal habeas corpus. Only rulings that result in the denial of fundamental fairness will support such relief. *Walker v. Engle*, 703 F.2d 959, 962-63 (6th Cir.), *cert. denied*, 464 U.S. 962 (1983). The inquiry is not whether the state court ruling was correct as a matter of state law, but whether the ruling

denied petitioner a fundamentally fair trial. *Moore v. Tate*, 882 F.2d 1107, 1109 (6th Cir. 1989). Bowles has not shown the ruling denied him a fair trial.

Ground Three

Bowles alleges denial of a fair trial when (1) he was questioned on cross-examination about the fact he did not voluntarily make a statement to the police, and (2) when the court permitted evidence concerning efforts made by the police to contact him to make a statement.

The Ohio appellate court noted that the "prosecution did not attempt to impeach [Bowles] by claiming that he failed to make a statement to the police after he was arrested. Rather, the prosecution presented evidence that [Bowles] did not come forward to make a statement until nearly two months after the incident even though he was aware the police were looking for him. The evidence . . . was permissible because it was relevant to prove that appellant was attempting to evade the police." (RX 15 at 9-10)

Bowles cites *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). *Doyle* held that a defendant who was arrested, given his *Miranda* rights, and did not make an exculpatory statement, but who testified at his trial, and gave exculpatory testimony, and was then cross examined at trial about his failure to have told the exculpatory story when he was arrested was denied his right to due process. The appellate court did not unreasonably apply, or rule contrary to, *Doyle*.

Ground Four

Ground four is the first of five grounds (grounds four through eight inclusive) that raise denial of a fair trial concerning the jury instructions. Ground four alleges the prosecutor was permitted to elicit from a testifying co-defendant (Hayden) that he had been convicted of murdering Gipson, but the court did not give any limiting instruction to the jury concerning that fact.

The Ohio appellate court noted the initial cross examination of Hayden by the prosecutor made no reference to any of Hayden's prior convictions. However, on cross examination by Bowles, Hayden was asked whether he had been convicted of any felony offenses during the past ten years. Hayden answered he had been convicted of a drug trafficking charge but failed to mention being convicted of murdering the victim for which Bowles was being tried. As a result, on recross examination of Hayden by the prosecution, he was asked about the murder conviction.

The court held that Bowles' cross examination had "opened the door" either to being impeached or under the "invited error" rule. Thus, Bowles could not take advantage of the prosecution recross. Accordingly, Bowles could not raise the issue on appeal. (RX 15 at 10-11.)

Bowles did not raise the issue of a failure to instruct on his direct appeal (RX 13 at ii, 12), thus the appellate court did not mention the lack of a cautionary instruction. However, Bowles has not cited any Supreme Court precedent in support of this ground (petitioner's brief at 8-9), thus has not met his burden.

Moreover, generally, errors in instructions of a trial court to a jury in a state criminal trial are not reviewable in federal habeas corpus proceedings. They are not constitutional errors unless they are so fundamentally unfair as to deprive petitioner of a fair trial and due process of law. Undesirable, erroneous, or even universally condemned instructions may survive due process scrutiny. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). In reviewing state court instructions on a claim of constitutional error, the challenged instructions should not be "judged in an artificial isolation but must be viewed in the context of the overall charge." *Boyde v. California*, 494 U.S. 370, 378 (1990) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)); *see also, Estelle v.*

McGuire, 502 U.S. 62, 72 (1991). An omission, or incomplete instruction, is less likely to violate due process than is a misstatement of law. *O'Guin v. Foltz*, 715 F.2d 397, 399 (6th Cir. 1983). The ultimate question to be decided is whether there is a "reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution." *Victor v. Nebraska*, 511 U.S. 1, 22 (1994); *see also, Estelle*, 502 U.S. at 72-73 n.4. The appellate court's decision was not an unreasonable application of Supreme Court precedent.

V. Ground Five

Bowles contends the court erred when it refused to instruct on a lesser included offense.

Bowles claimed on direct appeal that assault is a lesser included offense of murder, and while he admittedly kicked the victim, his kicking did not actually kill the victim. The appellate court noted Bowles was convicted of felony murder pursuant to Ohio Rev. Code. §2903.02(B) which only required the state prove the victim's death was a proximate result of Bowles' commission of an offense of violence that is a felony of the first or second degree. Bowles' underlying felony was felonious assault in that he "participated in the beating administered to the victim. He aided and abetted Richard Hayden, the principle offender." (RX 15 at 11.) When someone knowingly aids and abets, he is regarded as a principle and is just as guilty as if the person performed every act constituting the offense. Thus, "whether or not [Bowles] physically administered the actual blow that caused the victim's death is irrelevant." Since Bowles was tried as an accomplice, rather than a principle, "it would have been improper to instruct the jury on the lesser included offense of assault." (*Id.* at 12.)

Bowles cites *Hopper v. Evans*, 456 U.S. 605, 611-12 (1982), which held that due process requires a lesser included offense instruction "when the evidence warrants" it, but "only when

the evidence" warrants it. The court examines state law to determine if such an instruction is required. (*Id.* at 611.)

Since Ohio law did not require a lesser included offense instruction in Bowles' case, due process was not violated by the trial court's refusal to give the instruction. The appellate court did not unreasonably apply, or rule contrary to, *Hopper*.

VI. Ground Six

Ground six alleges the trial court unconstitutionally created a presumption in favor of the state on the issue of whether Bowles aided and abetted. Bowles argues the presumption was created by the following portion of the instructions (T. 536):

> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed.

The Ohio appellate court noted there were other portions of the instructions that were relevant, e.g., the trial court instructed that "mere presence is not enough to make [appellant] an accomplice." (RX 15 at 12.) Consideration of the entire jury instructions made it clear there was no error; indeed, previous Ohio decisions had upheld the same language used by the trial court in this case. (RX 15 at 12-13.)

The trial court's aiding and abetting instructions herein were comprehensive (T. 534-36), including that "in aiding, abetting, there must be active participation no matter how slight. Mere presence is not enough to make [Bowles] an accomplice, he must have done something more, he must have helped, assisted, incited, strengthened, encouraged another or otherwise participated as accomplice, however slight, in the criminal act in one of the ways I have previously mentioned." (*Id.* at 535-36.)

Bowles relies, *inter alia*, on *United States v. Gainey*, 380 U.S. 63 (1965), which considered the issue of whether a

statutory inference in a criminal case was constitutional. *Gainey* observed the court's instructions informed the jury that despite the statutory inference based on the defendant's presence at the scene of the crime, the instructions also stated the jury could still acquit. (*Id.* at 68.) Since no inference was created by the instruction, *Gainey* does not apply.

The argument of Bowles that one sentence taken out of context established a presumption is not well taken when considered as part of all the instructions. Bowles has not met his burden

VII. Ground Seven

Bowles contends a jury instruction unconstitutionally referred to Bowles as an "accomplice" of Hayden. The trial court instructed at one point, "[n]ow we had an accomplice testify in this case." (RX 15 at 13.) Bowles contends use of the word "accomplice" in the instructions "in effect informed that jury that Hayden was an accomplice of defendant." (Petitioner's brief at 15.)

The Ohio appellate court noted the following. The trial court was required to comment on accomplice testimony under Ohio Rev. Code §2923.03(D) which requires that when an accomplice testifies, a charge must substantially state the following:

> The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

The trial court essentially set forth the instruction, quoted above, as required by state law. (T. 537) The portion of the instruction objected to did not, in context, negate the statute. The court also held that if omission in the instructions of the word "alleged" before the word "accomplice" was error, it was harmless. (RX 15 at 13-14.)

As noted above, the court extensively instructed the jury on aiding and abetting. The jury was told, "if you find beyond a reasonable doubt that the defendant knowingly aided or abetted" Hayden or the other individual who participated in the beating "in committing or attempting to commit the offense of felonious assault and that Ollie Gipson died as a proximate result of the attempted commission or attempted commission, that is felonious assault, then you must find the defendant guilty." (T. 534-35) These instructions, and others, negated any suggestion that use of the word "accomplice" in one sentence eliminated the burden of proving the aiding and abetting element.

Bowles cites *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), which in pertinent part stated a guilty verdict will not be permitted if the jury instructions did not require the jury to find each and every element of the crime under the proper standard of proof. *Gaudin* did not involve the issue of using the word "accomplice" in the context of aiding and abetting jury instructions.

Bowles also cites *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986). The same observation applies as noted in *Gaudin*. While *Cabana* dealt with a state felony murder statute, the issue was whether it is constitutional to impose the death sentence on to someone who commits felony murder. Capital punishment is not an issue in this case.

In summary, Bowles has failed to show that either *Gaudin* or *Cabana* applies to the issues in his trial and has not otherwise met his burden.

VIII. Ground Eight

Ground eight alleges: (1) the court refused to instruct that the state had to prove a culpable mental state in order to convict Bowles, and (2) the court improperly instructed on flight despite the fact it was not an issue.

Bowles requested an instruction that causing the death of another must be done knowingly (T. 441), but the court refused to give the instruction. The appellate court noted Bowles was being prosecuted for a felony-murder under Ohio Rev. Code §2903.02(B), which meant the state had the burden of proving Bowles caused "the death of another as a proximate result of the offenders committing or attempting to commit an offense of violence that is a felony of the first or second degree." (RX 15 at 14.) The state had to prove Bowles committed felonious assault which meant it had to prove Bowles "knowingly caused serious physical harm to another," citing Ohio Rev. Code §2903.11(A)(1), and the jury "was so instructed." In other words, the state was not required to prove that Bowles knowingly caused the death of the victim, only that he "knowingly caused serious physical harm to the victim which proximately resulted in the victim's death." (*Id.* at 15.)

Bowles has not cited a Supreme Court case, and the appellate court only analyzed the issue under state law. Thus, Bowles has not met his burden.

Regarding the instruction on flight, the appellate court noted that Bowles did not object to that charge, thus to reverse, it had to be found the trial court committed plain and substantial error. (RX 15 at 15.) The court found it was error to charge on flight, but the erroneous instruction was harmless beyond a reasonable doubt because of the overwhelming evidence of guilt. (*Id.* at 16.)

The fact Bowles did not object to this instruction, and this failure was noted by the appellate court, and applied by the

court, means that Bowles committed a procedural waiver. *Cooey v. Coyle*, 289 F.3d 882, 897-98, 901 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1620 (2003); *Hinkle v. Randle*, 271 F.3d 239, 244-45 (6th Cir. 2001). Bowles has not attempted to show cause and prejudice, thus the flight instruction issue is waived.

IX. Ground Nine

Bowles contends prosecutorial misconduct in the final argument. The Ohio appellate court considered Ohio law and found the comments Bowles complains of were not prejudicial. Specifically, the "strength of the evidence against appellant and the trivial nature of the prosecutor's comments militate against a conclusion that appellant was prejudiced by any of the prosecutor's arguments." (RX 15 at-17.)

Bowles has not cited a Supreme Court precedent, thus has not met his burden.

Generally, the scope of review is narrow as *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974), noted:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly also noted, assuming there was prosecutorial misconduct, it must rise to a level that denies a defendant's right

to due process. Whether prosecutorial argument is so egregious as to render a trial fundamentally unfair must be determined by the totality of circumstances surrounding the individual case. *Summit v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979), *aff'd sub. nom., Watkins v. Sowders*, 449 U.S. 341 (1981). The issue of determining what prosecutorial error, assuming misconduct occurred, reaches egregious levels under *Donnelly* has been described as "not easy." *See Cook v. Bordenkircher*, 602 F.2d 117, 120 (6th Cir. 1979), *cert. denied*, 444 U.S. 936 (1979).

The appellate court appropriately applied *Donnelly* under the AEDPA.

X. Ground Ten

Bowles contends a denial of due process and equal protection because he was convicted of murder for committing a crime that was actually the equivalent of involuntary manslaughter, but he received a much longer sentence than if he had been convicted of involuntary manslaughter.

The Ohio Court of Appeals noted it had previously held that Ohio Rev. Code §2903.02(B) does not violate due process. That section does not eliminate the burden of proving *mens rea* because the intent to kill is conclusively presumed if the state proves the required intent to commit the underlying felony in the felony murder conviction. (RX 15 at 17-18.)

The court rejected the equal protection claim because no suspect class or fundamental right was involved. The legislation creating the felony murder rule bears a rational relationship to legitimate governmental interest. (*Id.* at 18-19.)

Bowles has not cited one Supreme Court precedent in support of his claims, choosing instead to cite Ohio law (traverse at 2024), thus has not met his burden.

Ground XI

Bowles contends there is insufficient evidence to convict him as an aider and abettor. On direct appeal, he contended "he merely kicked Ollie Gipson in the stomach and was in the car when Hayden administered the fatal blows to Gipson." (RX 15 at 20.) The appellate court reviewed the evidence (*id.* at 22):

> Richard Hayden testified that [Bowles] threw the first punch at Gipson, which caused him to flinch forward and then Damon Anderson punched him twice. Barbara Adeyemi testified that appellant and Anderson continuously beat Gipson by stepping on him and kicking him while Hayden was stomping on his head.

The appellate court found this was sufficient evidence to prove that Bowles aided and abetted Hayden "by participating in the beating of Gipson," thus denied the assignment of error. (*Id.*)

The constitutional standard for reviewing the sufficiency of the evidence was established in *Jackson v. Virginia*, 443 U.S. 307 (1979). Justice Stewart held that the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The standard is not whether the evidence is sufficient to convince the habeas court of the petitioner's guilt beyond a reasonable doubt. Nor does that standard require the prosecution to rule out every hypothesis except that of guilt beyond a reasonable doubt. *See Scott v. Perini*, 662 F.2d 428 (6th Cir. 1981), *cert. denied*, 456 U.S. 909 (1982).

The argument of Bowles is based upon portions of his own and Hayden's testimony, both of whom tended to minimize Bowles' participation. A rational jury could disbelieve the testimony cited by Bowles and instead credit the testimony

identified by the appellate court. The appellate court did not unreasonably apply *Jackson*.

RECOMMENDATION

It is recommended the petition be denied.

Dated: 23 May 2003 /s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:02CV1520

(JUDGE DONALD C. NUGENT)

KEITH BOWLES,

Petitioner,

vs.

HARRY RUSSELL, Warden,

Respondent.

OBJECTIONS AND EXCEPTIONS TO THE REPORT AND RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

Now comes petitioner, Keith Bowles, and files these objections and exceptions to the report and recommended decision of the Magistrate Judge. Petitioner objects to each and every finding made by the Magistrate Judge and requests that this court conduct a *de novo* review of the entire record.

As a general proposition, the Magistrate Judge makes an improper analysis of these proceedings that were conducted in a state court. In the most part, the state court ignored the federal constitution issues and decided many of these matters under state law.

Consequently, this court is not bound by that determination. This was not an adjudication on the merits by a state court considering federal constitutional issues. In *Doan v. Brigano*, 237 F.3d 722 (6th Cir.2001); 28 U.S.C. §2254(d).

I

The Magistrate Judge, in considering defendant's claim concerning a jury panel that had been exposed to a trial of the co-defendant and fails to even acknowledge the decision in *Quintero v. Bell*, 256 F.3d 409 (6th Cir.2001). In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S.717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S .333 (1966).

There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr. Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U.S.522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev.Code §737.05.

II

The Magistrate Judge in considering the second claim as to the propriety of Richard Hayden being called as a court's witness fails to consider the constitutional implications. It is

not merely a question of state law. Petitioner was denied fundamental fairness by reason of the proceedings. By reason of the court calling Hayden as a court's witness, this gave enhanced credibility to this witness when the witness was not entitled to it. There was absolutely no basis for calling as witness.

Over objection, Richard T. Hayden was called as a court's witness. Richard Hayden was a principal offender who had been previously convicted. There is no basis for calling him as a court's witness. The prosecution had not even spoken to Richard Hayden. (Tr.68-70). Moreover, the prosecution had in its possession Richard Hayden's statements to the police along with his trial testimony. (Tr.71). There was no indication that Richard Hayden would not testify in accordance with his previous declarations or would recant, become hostile or refuse to testify. The calling of Richard T. Hayden as a court's witness not only violates the Ohio Rules of Evidence but deprived defendant of a fair trial and due process of law guaranteed by Section 10, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Jamal Russell was also improperly questioned about his statements and answered a question by stating that his police statement so said as he testified to. (Tr.171).

Petitioner was prejudiced by this tactic. The prosecutor, by asking leading questions, referred to his statement and alluded to all-encompassing statements such as "everyone" wanting to fight and get revenge. (Tr.87). This was referred to as "everybody" and "all". (Tr.88). The prosecutor then related to Hayden his statements to the police about hitting Gipson. (Tr.101-02). Petitioner was just lumped together as "the three of you." (Tr.111).

This tactic was repeated when the prosecutor told Hayden what he purportedly told the police. He simply made references to the "three of you." (Tr. 143-44, 4x), or "all of you"

Evid R.607 also states that a party calling a witness may attack the witness' credibility through use of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This rule was established to negate the strategy of a party calling a known adverse witness simply to get a prior inconsistent statement into evidence by way of impeachment and "thus doing indirectly what he could not have done directly." This is exactly what the state did in this case. The state should not have been permitted to do under one rule of evidence what another rule of evidence expressly prohibits. Fundamental fairness dictates that the state play by the rules. Here, the state used the court as a straw man to get inadmissible evidence that in front of the jury to bolster its case. It is within the discretion of the trial court to call a witness as the court's witness in the interest of justice and the ascertainment of the truth. However, the court's role is not to be a tool of the prosecutor to reveal the state's version of the truth. *United States v. Wilson*, 447 F.2d 1, 8-9 (9th Cir.1971)

III

The Magistrate Judge, in considering this claim again misses the point. The Magistrate Judge, without any analysis, adopts the reasoning by the Court of Appeals. The Magistrate Judge stated that the prosecution offered evidence that petitioner did not come forward to make a statement for nearly two (2) months after the incident even though he was aware the police were looking for him it was permissible because it is relevant to prove petitioner was attempting to evade the police. This was absolutely incorrect. Even if the police were looking for petitioner, petitioner was not required to make a statement. There was absolutely no relevance to anything in this case other than to bring before the jury that the prosecutor claimed that petitioner was obligated to make a statement and since he did not make a statement that was evidence of his guilt. The analysis by the court was flawed. The Magistrate Judge did not even consider what occurred at the trial

and the context in which it occurred at the trial. The prosecutor improperly questioned petitioner when he testified. Later the prosecutor commented on the fact that petitioner did not come forward and voluntarily to make a statement to the police.

Petitioner testified in his own behalf. On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.43 5).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Minor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S.610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be con-

stitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir. 2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

IV

The Magistrate Judge, in considering the claim that petitioner was denied a fair trial when the prosecutor was permitted to elicit from a testifying co-defendant, Richard Hayden, that he had been convicted of murdering Holly Gibson. The court failed to give any limiting instruction again misses the point.

Hayden was properly cross-examined as to whether he had been convicted of a felony in the last ten (10) years. Rule 609 of the Ohio Rules of Evidence specifically allows that inquiry. This was only elicited to test the credibility of a witness and not for any substantive purpose. Hayden answered that he had a drug trafficking charge. This was sufficient. The prosecutor had no need to go into the fact that he had been convicted in connection with the death of Ollie Gipson.

The state improperly called Richard T. Hayden and convinced the court to call him as a court's witness. By this ruse the prosecutor was able to place before the jury that Richard T. Hayden had been convicted of Gipson's murder. (Tr 151-52). This left the jury with the obvious inference that since Hayden was convicted of murder petitioner was prosecuted as an aider and abettor to Hayden that petitioner was guilty. No cautionary instruction was given by the court. The courts have ruled that if there is a guilty plea or a conviction of one associated with the same offense on trial that the jury must be instructed not to consider that plea. The court overruled petitioner's objections to this line of inquiry and permitted the witness to answer. (Tr.151-52). Thus, the jury heard the principal being guilty and petitioner, being an aider and abettor to the principal Richard Hayden that he was guilty in this regard. Although Hayden did not plea guilty he was found guilty and the same rules as to a guilty plea is applicable here. "Evidence of . . . guilty pleas is a amenable misuse. Without instruction, it is possible the jury could use the pleas as evidence of . . . guilt. This danger may be averted only by adequate cautionary instructions. . . ." *United States v. Rivera-Santiago*, 872 F.2d 1073, 1084 (1989). Such a limitation would have been appropriate ". . . because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant given the natural human tendency to assume that if an aider and abettor is guilty, the princpal must also be guilty." *Government of Virgin Islands v. Mujahid*, 990

F.2d 111, 116 (3d Cir.1993). See *United States v. Prawl*, 168 F.3d 622 (2d Cir.1999).

Evidence that a co-conspirator has been convicted is inadmissible because it might cause the jury to "regard the issue of the remaining defendant's guilt as settled and [conclude that] the trial is a mere formality." *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985). When the co-conspirator testifies it is proper to introduce his prior convictions to assess his credibility. *United States v. Sanders*, 95 F.3d 449, 454 (6th Cir.1996). However, when a conviction is introduced the ". . . court is required to give a cautionary instruction to the effect that the jury may use the conviction or guilty pleas only to determine the testifying witness's credibility." 95 F.3d at 454.

V

Petitioner contends that he was denied his right to present a defense when the court would not instruct the jury on any lesser included offense.

The right to an instruction to an instruction on a lesser included offense is a component of the right to present a defense guaranteed by the constitution. *Washington v. Texas*, 388 U.S.14 (1967).

An instruction on a lesser included offense was noted by the court as a component of the right to present a defense. *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2000).

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr.244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr.466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

In this case petitioner was entitled to such an instruction. There was ample evidence that petitioner was only guilty of an assault and not of murder. Where the record presents evidence concerning the existence of a lesser offense this the court is duty bound to so instruct the jury.

In *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 591, 575 N.E. 828, 831 (1991), the following was stated:

> It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St. 2d 287, 75 O.O. 2d 331, 348 N.E. 2d 135. However, the corollary of this maxim is also true. "Ordinarily requested instructions should be given if they are correct statements of the law applicable to the fact in the case and reasonable minds might reach the conclusion sought by the instruction." Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed. 1991) 860, Section 36:2. See, also *Feterle v. Huettner* (1971), 28 Ohio St. 2d 54, 57 O.O. 2d 213, 275 N.E. 2d 340, at the syllabus: "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n]* * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction."

An instruction on lesser included offenses is required if the jury could reasonably find against the state on any element of the greater offense. This rule was set forth as follows:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime

> charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.
>
> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to the defendant. *State v. Wilkins*, 64 Ohio St. 2d 283, 388, 415 N.E. 2d 303, 308 (1980). Accord, *State v. Davis*, 6 Ohio St. 3d 91, 95, 451 N.E. 2d 776 (1983); *State v. Solomon*, 66 Ohio St. 2d 214, 421 N.E. 2d 139 (1981).

The Due Process Clause of the Fourteenth Amendment requires that lesser included offenses be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence, Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208,

> 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). See *Sansone v. United States*, 380 U.S. 343, 349 (1965).

VI

The Magistrate Judge, in considering this claim, stated that the presumption given by the trial court was not unconstitutional because of other instructions given. Thus, there was no error. However this was an important component of the instruction.

Although a court is required to consider the entire jury charge, an instruction which relates to the burden of proof and one which relieves the state from proving an element of the offense is subject to special scrutiny. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court considered an instruction which stated a presumption. As stated by the court:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. The reviewing court has no way of knowing which of two irreconcilable instructions the jury applied in reaching their verdict. . . . 471 U.S. at 322.

In instructing the jury on aiding and abetting the jury was told that:

Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

First, direct evidence was offered on this proposition. The Supreme Court has ruled that a jury should not be instructed on a presumption when evidence is offered on the subject. In *Forbes v. Midwest Air Charter Inc.*, 86 Ohio St.3d 83, 711 N.E.2d 997 (1999), the court informed the jury about a statutory presumption even though evidence had been offered. The court reversed because ". . . the jury in this case should not have been instructed as to the . . . presumption . . . because 'evidence tending to prove a fact . . . , which for procedural purposes would be presumed in the absence of such evidence,' was presented. . . ." 86 Ohio St.3d at 86-87, 711 N.E.2d at 999.

Second, this is unconstitutional because it is arbitrary and unreasonable. There is no rational connection between the fact proven and the fact presumed. Under the instruction the jury could conclude that defendant was guilty as an aider and abetter merely from his presence, companionship and conduct before or after the offense is committed. This is an unconstitutional presumption. *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463, 467 (1943); *State v. Swanson*, 52 Ohio App.3d 78, 557 N.E.2d 848 (1989).

Third, this was an improper statement of the law. Even if the evidence of the prosecution is believed, "the mere presence of an accused at or near the scene of the crime does not conclusively establish that the accused committed the crime. . . ." *State v. Weber*, 124 Ohio App.3d 451, 463, 706 N.E.2d 427, 435 (1997). This is instruction is misleading because it goes to aiding and abetting. This evidence occurs

"after the event." Evidence of aiding and abetting must precede the occurrence. Thus:

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its occurrence other than merely seeking the crime being committed. *State v. Starr*, 24 Ohio App.2d 56, 263 N.E.2d 572 (1970).

Further, in *State v. Sims*, 10 Ohio App. 3d 56, 64, 460 N.E. 2d 672, 676 (1983), the court stated that:

> A frequently quoted definition of "aiding and abetting" is contained in Smith v. State (1931), 41 Ohio App. 64, 67-68, 179 N.E. 696:
>
> "In the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed." *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476.

Thus, this is a misstatement of the law because the fact that petitioner may have been with Hayden afterwards was allowed to be used by the jury to conclude that petitioner aided and abetted Hayden.

Fourth, such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Fifth, there is no statutory basis for giving such an instruction whether the presumption be deemed permissive or mandatory. This presumption is no where spelled out in the Ohio Criminal Code.

In Ohio the legislature is the only body that has authority to define crimes. Since this is not set forth in any statute, the court may not usurp a legislative function and instruct the jury with reference to such a presumption. *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.2d 451, 455-56, 715 N.E.2d 1062, 1071 (1999).

Thus, a court has no authority to give a jury instruction concerning a presumption which arises from a judicial decision. If any presumption exists in these circumstances it has to be the result of an act of the legislature and not the court. Even a presumption under Rule 301 of the Ohio Rules of Evidence it refers only to civil actions and presumptions provided for by the General Assembly.

VII

The Magistrate Judge in considering the issue about the court stating that Richard Hayden was an "accomplice" of defendant again misses the point. While the court was required to give an instruction on an accomplice's testimony, it was a jury question whether Hayden was an accomplice. Thus, a correct jury instruction would be that if the jury found that Hayden was an accomplice then his testimony should be reviewed differently from other witnesses. The court, in effect, instructed the jury that Richard Hayden was an accomplice. This was a fact determination that petitioner was an accomplice of Richard Hayden

The court instructed that "Now we had an accomplice testify in this case." (Tr.537). This was objected to by petitioner. (Tr.557-558). This was an unconstitutional comment on the evidence. Whether Richard T. Hayden was or was not an accomplice is a fact question. By designating Richard T. Hayden as "accomplice" the court in effect informed that jury that Hayden was an accomplice of defendant. There is no other way in which this statement could be taken. This denied petitioner a fair trial and invaded the province of the jury.

A fundamental constitutional right is violated because:

> The Constitution gives a criminal defendant the right to have the jury determined, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. . . . *United States v. Gaudin*, 515 U.S.506, 522-23 (1995).
>
> A defendant charged with a serious crime has the right to have the jury determine his guilt or innocence, . . . and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each and every element of the crime under the proper standard of proof, . . . Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from a failure to instruct it to find an element of the crime. . . . *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986).

VIII

The Magistrate Judge, in considering an instruction that the prosecutor was not required to prove a culpable mental state. Since petitioner was tried as an aider and abettor again is in error. Petitioner, who was convicted of the offense of murder and sentenced to a term of imprisonment of fifteen (15) years to life certainly had the right to require the state to prove a culpable mental state in order to convict petitioner.

Petitioner requested that the jury be instructed that causing the death of another must be done knowingly, (Tr.441). The court refused to give such an instruction. Thus, petitioner was strictly liable for the offense without the necessity of proving a culpable mental state. This denied petitioner due process of law. Without such a requirement the indictment would not charge an offense. Further, not giving this instruction resulted in an elementary denial of due process of law.

The Ohio Supreme Court has ruled that "guilty knowledge is an essential ingredient of crime. . . ." *State v. Cameron*, 97 Ohio St.59, 60, 109 N.E.584, 589 (1914).

The elements of criminal liability are set forth in §2901.21(A)-(D) of the Ohio Revised Code. Different degrees of criminal culpability are defined in §2901.22(D) of the Ohio Revised Code. To permit one to be criminally liable without proving a *mens rea* is certainly impermissible. This would not satisfy the constitutional requirement statute be drafted to advise one whether his conduct will come within the proscribed conduct.

Moreover, defendant's act has to be voluntary. §2901.21 of the Ohio Revised Code prescribes culpable criminal behavior:

> (C) As used in this section:
>
> (1) Possession is a voluntary act if the possessor knowingly procured or received the thing posses, or was aware of his control thereof for a sufficient time to have ended his possession.
>
> (2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

Thus, criminal liability must be based on more than what is required for liability for negligence in a civil action. The instruction given by the court did not require such proof.

Where criminal liability, and especially felony liability is involved, the state must comport with constitutional guidelines. Thus, actual knowledge is required. Otherwise, the statute would be unconstitutional. *United States v. Wolff*, 785 F.2d 1121 (6th Cir.1985).

The court instructed the jury on flight:

> In this case there has been evidence presented that the defendant, Keith Bowles, fled from the Argonne Arms, the vicinity of the alleged crime, and then remained at large. In regarding this evidence you are instructed that flight in and of itself does not raise a presumption of guilt but it may tend to show consciousness of guilt or a guilty conscience with the crime.
>
> If, therefore, you find that the defendant did flee from the Argonne Arms, the vicinity of the alleged crime, and then remained at large, you may consider these circumstances in the case in determining the guilt or innocence of the defendant. (Tr.536-37).

A flight instruction was inappropriate because petitioner had no other means to get from Painesville to Cleveland, (Tr.120). Jamal Russell drove the car with defendant in the rear seat. (Tr.136). The police even waived them on to leave the area. (Tr.137). Afterwards Jamal Russell switched seats with Hayden driving. (Tr.138). The officer told all to leave and petitioner was driven back to Cleveland. (Tr.174).

In *Dillion v. State*, 7 Ohio L.Abs.46 (Ct.App.1928), the court stated that "the circumstances of flight is as consistent with the theory of innocence as of guilt so far as the charge is concerned."

In another federal case, the following was stated concerning the matter of flight.

> The conduct of an accused person in seeking to flee following the commission of an alleged crime may be circumstantially relevant to probe both the commission of the act and the intent and purpose with which it was committed. . . . But in order to have such relevance, it must be shown that the person attempting to flee had reason to believe that he was being, or would be, sought

in connection with the commission of the particular offense in question. *Embree v. United States*, 320 F.2d 666, 668 (9th Cir.1963).

IX

The Magistrate Judge does not consider properly the misconduct of the prosecuting attorney during final argument. The Court of Appeals found that it was error but it was harmless error However the court undertook an improper harmless error analysis.

Constitutional error can be said to be harmless only if "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Second, in *Chapman*, the court ruled that "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

A number of improper statements were made by the prosecutor during the trial including statements as to what constitutes evidence. *Kincade v. Sparkman*, 175 F.3d 444 (6th Cir. 1999).

1. The prosecutor made much of the fact that petitioner did not come in and talk to the police. As stated previously, even if petitioner did turn himself in, he certainly did not have to make a statement. (See pp. 5-9, *infra*)

The prosecutor argued that "Why do you think the other people came in, hey, I just kicked the dude, I didn't shoot no one?" (Tr.479).

Even though an objection was sustained the prosecutor went on to argue that this showed a consciousness of guilt.

> Now ladies and gentlemen, you will also hear the judge instruct you on flight, what constitutes flight. You heard the evidence, this thing rook place on August 23rd, Mr. Bowles knew darn well that something bad happened to these guys. He knew there was a death, he

knew there were two deaths. Two of his lifelong buddies went in and talked to the police and gave statements, they all me back at the Keyhole that night, they knew what happened, Mr. Bowles doesn't turn himself in—

MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.483-84).

Later, the following argument was made:

Within the week Mr. Russell came in and talked, Mr. Anderson came in and talked, Mr. Hayden came in and talked, Mr. Bowles didn't come in. Mr. Bowles went out and he had breakfast that morning not far from MetroHealth Center according to his testimony, Ollie Gipson died at 9:25 a.m., on the 23rd of August—

MANCINO: Objection.
MR. HACKMAN: —in the City of Cleveland—
THE COURT: Overruled. (Tr.486)

These arguments equate flight with exercising a constitutional right against self-discrimination. This was improper argument. *Minor v. Black*, 527 F.2d 1 (6th Cir.1975). Petitioner was denied a fair trial. *Martin v. Parker*, 11 F.3d 613 (6th Cir.1994); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir.1990).

2. The prosecutor improperly stated that defendant was guilty:

Ladies and gentlemen, Mr. Bowles is guilty. (Tr.486).

United States v. Fullerton, 187 F.3d 587, 592 (6th Cir. 1999), "The rule of law in Ohio is well settled that a prosecutor commits reversible error in stating in argument to a jury that in his personal opinion a defendant in a criminal case is guilty of the crime charged." *State v. Thayer*, 124 Ohio St.1, 176 N.E.656 (1931) at syllabus.

Improper statements concerning the evidence, even if unobjected to, are reversible error. *State v. LaFreniere*, 85 Ohio App.3d 840, 853-54, 621 N.E.2d 812, 821-22 (1993).

3. The prosecutor further improperly argued as to what the law was and what had to be proven in the case. First the prosecutor stated that the case had nothing to do with the defendant intending to kill anyone. (Tr.474). Then the prosecutor improperly stated what constitutes aiding and abetting, "You will hear the Judge instruct you that one who aids and abets another is just as guilty . . . as the principal offender. You will be instructed that active participation, however slight, is aiding and abetting another person. (Tr.475).

This is an improper statement of aiding and abetting, which oversimplifies and misstates the law.

Thereafter, the prosecutor stated that they did not have to prove that the three of them specifically intended to cause serious physical harm. (Tr.505-06).

4. The prosecutor maligned defense counsel. The prosecutor attempted to give his opinion as to what statements of Richard Hayden were the truth.

> Richard Hayden, what he's trying to tell you to listen to and told you Mr. Bowles kicked him one time. Now remember Mr. Hayden's testimony, Mr. Hayden every time in his prior statement that he made, prior statement of his was all, all three of us were kicking, then Mr. Mancino put the words his mouth about one kick and he would agree to that.
>
> MR. MANCINO: Objection.
> THE COURT: Overruled. (Tr.514)

Thereafter, the following was stated:

> But Barbara Adeyemi, Mr. Mancino talks about her statement to the police and he's trying to say to you here that she never told the police and he's trying to say to

you here that she never told the police the three of them were beating this man, that's not true.

MR. MANCINO: Objection.
MR. CULOTTA: That is not true—
THE COURT: Overruled.
MR. CULOTTA:—and not what she said. In fact the statement he was reading to you it starts off one of the three beaters.
MR. MANCINO: Objection.
THE COURT: Overruled. (Tr.515)

This denigrates defense counsel and is improper. *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203, 207 (1993). ("It is improper to denigrate defense counsel in the jury's presence for making objections. . . .").

X

The Magistrate Judge in considering the constitutional arguments misapplied the Equal Protection Clause. Petitioner need not assert he was a member of a suspect class. However petitioner claimed that persons charged with the same offense are treated differently. The Due Process Clause and Equal Protection Clause of the Ohio Constitution are the equivalent of the federal guarantees. Thus, reference to state cases applies equally to this case in a federal court.

Murder, which carried a penalty of fifteen (15) years to life, contained essentially the same elements of involuntary manslaughter which carried a maximum sentence of ten (10) years. However, by using the same elements of involuntary manslaughter petitioner was sentenced to fifteen (15) years to life. It thus violated his right of due process and equal protection of the law.

Petitioner was indicted on September 4, 1998 under the newly enacted form of murder. The indictment alleged as follows:

> On or about the 23rd day of August, 1998, at the City of Painesville, Lake County, Ohio, one KEITH BOWLES aka "K.B.", did cause the death of Ollie T. Gipson as a proximate result of KEITH BOWLES aka "KB." Committing or attempting to commit an offense of violence that is a felony of the first or second degree, to-wit: Felonious Assault, in violation of Section 2903.11 of the Revised Code.

This version of defining murder is contained in §2903.02 (B)-(C) of the Ohio Revised Code:

> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.
>
> (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

This statute is unconstitutional. It constitutes a denial of equal protection of law and is arbitrary, capricious and unreasonable.

In effect, the Ohio General Assembly has retained the traditional definition of murder which is to purposely cause the death of another while also calling it murder which is the functional equivalent of involuntary manslaughter.

This statute was unreasonable and arbitrary because to commit murder while in the commission of certain specified felonies does not even require a culpable mental state. Moreover, there must be no proof that the person purposely caused the death of another. Murder has always been, in Ohio history, an intentional act. Since murder carries a penalty of

fifteen (15) years to life, involuntary manslaughter as either a felony of the first degree or third degree, only carries a maximum sentence often (10) years. Thus, by committing the very same act, different penalties are prescribed. The statute is unconstitutional because, in one form of murder the act be done "purposely", and the other eliminates of any culpable mental state. Disparate elements and penalties for the same act result.

It is hard to conceive that a murder could be committed without also committing some underlying felony. The new murder statute states that the act must be committed while committing or attempting to commit an offense of violence which is a felony of the first or second degree and which is not a violation of §2903.03 or §2903.04 of the Ohio Revised Code. This makes little sense. Without requiring a culpable mental state of purposely or a purpose to cause the death of another the new murder statute cannot pass constitutional muster.

Thus, what Ohio Revised Code §2903.02(B)-(C) does is to create two classifications of murder. However, there are less elements and an absence of a culpable mental state in murder under the newly enacted version contained in §2903.02(B) of the Ohio Revised Code. Given that there is no culpable mental state and no requirement that the act be done purposely and the same penalty result reeks of fundamental unfairness. It treats persons similarly situated completely different and imposes a greater penalty for an act which would essentially constitute involuntary manslaughter.

The statute requires that there be an "offense of violence." That term is defined broadly in §2901.01(A)(9) of the Ohio Revised Code. There are approximately thirty-two (32) specific statutes in Ohio which could constitute offenses of violence. What is particularly revealing is that an offense of violence must be ". . . committed purposely or knowingly, and involving physical harm to persons or a risk of serious

physical harm to persons; . . ." Thus, by definition an "offense of violence must be committed purposely or knowingly". Yet in this new version the death need not be caused either "purposely" and "knowingly" to constitute the offense of murder.

This is not just an example of poor legislative draftsmanship but evidences a statute that lacks required constitutional uniformity to satisfy the due process clause or the equal protection clauses of the Ohio and Federal Constitutions. It creates two classes of individuals who may be convicted of murder one whom must cause the death "purposely" and in the other one only must cause the death of another while committing or attempting to commit a specified offense of violence.

The Ohio Supreme Court has stated that the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution require ". . . that all similarly situated individuals be treated in a similar manner. . . . In other words, laws are to operate equally upon persons who are identified in the same class." *State ex rel. Patterson v. Industrial Comm'n.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008, 1011 (1996).

The Ohio Supreme Court has stated that a law, constitutional on its face, can be unconstitutional in its application:

> "[D]iscrimination against individuals or groups is sometimes an inevitable result of the operation of a statute." *Roseman v. Firemen & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d, 443, 446, 613 N.E.2d 574, 577. "The mere fact that a statute discriminates does not mean that the statute must unconstitutional" *Id.* at 446-447, 613 N.E.2d at 577.
>
> In determining whether a statute violates equal protection, we examine the class distinction dawn to decide if a suspect class or fundamental right is involved in

order to determine what level of scrutiny to apply. *Id.* at 447, 613 N.E.2d at 577. The right to sue a political subdivision has been held not be a fundamental right. *Fabrey, supra*, 70 Ohio St.3d at 353, 639 N.E.2d at 33. Moreover, this case does not involve a suspect class which has been traditionally defined as one involving race, national origin, religion, or sex. *Id.* Therefore, rather than apply heightened scrutiny, we review the statue accordingly to the "rational basis" test. Consequently, the statute must be upheld if it bears a rational relationship to a legitimate governmental interest. *Roseman, supra*, 66 Ohio St.3d at 447, 613 N.E.2d at 577. However, a statutory classification will be found to violate equal protection if it treats similarly situated people in a different manner based upon illogical and arbitrary basis. *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 711, 576 N.E.2d 765, 785, citing *Stated v. Buckley* (1968), 16 Ohio St.2d 128, 45 0.0.2d 469, 243 N.E.2d 66 (A.W. Sweeney, J., concurring in part and dissenting in part). *Adamsky v. Buckeye Local School District*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214 (1995).

This statute smacks of fundamental unfairness and is unconstitutional in its application. In cases where the Supreme Court has ruled that statutes which apply differently to persons in similar circumstances are unconstitutional as denying equal protection of the law. *See Caruso v. Aluminum Co. of America*, 15 Ohio St.3d 306, 473 N.E.2d 818 (1984); *State ex rel. Nytray v. Industrial Comm'n*, 2 Ohio St.3d 173, 443 N.E.2d 962 (1983).

XI

Petitioner contends there was insufficient evidence to convict him of murder. While there is evidence of assault, assault is not murder.

A.

Petitioner, who was prosecuted in a hybrid fashion as a principal offender and as an aider and abettor, was found guilty. The jury returned a specific finding that defendant was attempting to commit felonious assault.

Recently revised §2903.02(B) of the Ohio Revised Code created a new category of murder as follows:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of Section 2903.03 or 2903.04 of the Revised Code.

Felonious assault is felony of the second degree unless it involves a peace officer. Ohio Rev.Code §2903.11. There is no claim that the deceased in this case was a peace officer.

Thus, the substantive offense of felonious assault would be a felony of the second degree. An attempt to commit felonious assault is a felony of the third degree. Section 2923.02(A) of the Ohio Revised Code provides that "An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. . . ."

Consequently, an attempt to commit felonious assault would be a felony of the third degree and does not qualify as the predicate felony for murder.

This is a criminal statute. As required by §2901.04(A) of the Ohio Revised Code, "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

However, since the underlying offense of felonious assault as applicable to this case was a felony of the second degree, an attempt to commit that felony results in a felony of the third degree. Thus, the murder statute is inapplicable.

Further, the imposition of a term of imprisonment of 15 years to life results in a cruel and unusual punishment under the circumstances of this case. Petitioner was in the vehicle when fatal blows were inflicted by Richard Hayden. Petitioner did not urge, incite, counsel or direct Richard Hayden. Richard Hayden testified that he did this on his own without any participation of any other person. The resulting penalty in this case certainly does not fit the offense and results in a cruel and unusual punishment. The prosecution enhanced an assault, a misdemeanor of the first degree, to the offense of murder. This is clearly unconstitutional.

B.

Richard Hayden testified that defendant just "skimmed" the back of Gipson's head. (Tr.98). Petitioner just "skimmed" Gipson (Tr.100). Afterwards, Damon Anderson (Long) punched Gipson twice in the face. (Tr.100). Hayden then kicked him. At most, petitioner "probably kicked him once" which was "somewhere down around the legs or something." (Tr.101) Afterward "I kicked him maybe one or twice more." (Tr. 103).

Petitioner had no intention of beating anyone up. He was just a quiet person. (Tr.120-21). Gipson approached the car in a menacing manner when petitioner got out of the car. (Tr.123). Petitioner only "skimmed" Gipson which did no damage. (Tr.125)

After Gipson stumbled back Hayden "grabbed him, threw him down, tripped him down," (Tr.125). Petitioner had nothing to so with getting Gipson to the ground. (Tr.125).

Petitioner did not urge Hayden to do any damage. (Tr.125). Petitioner only kicked Gipson in the legs, (Tr. I 26), which did no damage. (Tr.127). Petitioner did not urge Anderson to kill Gipson. (Tr.127). Hayden was alone with Gipson and continued to kick him. (Tr.128). Hayden did throw Gipson to the ground. (Tr.129). Petitioner was in the car at this time,

(Tr.129-30), and said nothing to either Hayden or Anderson. (Tr.130). Hayden kicked Gipson straight on and Gipson did not get up. (Tr.131). Hayden said he did not intend to cause the death of Gipson. (Tr.140).

The whole purpose of going to Argonne Arms was to get "Stickman" (Antonio Rymmer) and "kick his ass". (Tr.163-64). Gipson approached the car with his hand in his shirt. (Tr.166, 192). It was thought that Gipson had a gun. (Tr.167). Petitioner only kicked Gipson. Afer petitioner got in the car Hayden "stomped on the guy's head three times. . . ." (Tr.168). No one had a gun or weapon. There was no prior plan to beat someone up. (Tr.186)

Russell did not know how Gipson wound up on the ground. (Tr.194). Petitioner only punch Gipson in the case. (Tr.195). Gipson was only kicked in the stomach by petitioner according to Russell. (Tr.196). Petitioner got back into the car when Hayden did this stomping entirely on his own, (Tr.197), while petitioner is seated in the back seat of the car. (Tr.198).

Further in this case there is insufficient evidence to prove defendant aided and abetted Richard Hayden. Richard Hayden testified that he inflicted the fatal blows on his own. Petitioner did not in any way participate in that fatal confrontation. It cannot be said as a matter of law that defendant was an aider and abettor in these circumstances.

The appropriate standard to determine whether one may be convicted as an aider and abettor was set forth in the syllabus in *State v. Starr*, 24 Ohio App. 2d 56, 263 N.E. 2d 572 (1970):

> Conviction as an aider and abettor in the commission of a crime requires proof beyond a reasonable doubt that the accused advised, hired, incited, commanded, counseled, or otherwise participated as a co-conspirator, or had some connection with the transaction preceding its

occurrence other than merely seeking the crime being committed.

It is apparent from the foregoing that there was insufficient evidence to convict the petitioner of aiding and abetting. It should be noted that under the complicity statute, §2923.03 of the Ohio Revised Code there are four forms of complicity. One of those is soliciting or procuring another to commit the offense. There is no evidence in this record and the petitioner was not charged with soliciting or procuring. It specifically charged with aiding and abetting another in the commission of the offense. Consequently, the conviction in this case violates elementary precepts of due process of law. There was clearly insufficient evidence to permit a rational factfinder to return a verdict of guilty.

Petitioner states that numerous constitutional errors were committed during the course of the proceedings. Petitioner is entitled to habeas corpus relief Thus the report and recommended decision of the Magistrate Judge must be rejected and a writ of habeas corpus issued to petitioner.

/s/ Paul Mancino
PAUL MANCINO, JR. (00155760
Attorney for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing Objections and Exceptions to the Report and Recommended Decision of the Magistrate Judge has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 27th day of June, 2003.

/s/ Paul Mancino
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02 CV 1520
Judge Donald C. Nugent
Magistrate Judge Streepy

KEITH BOWLES,
Petitioner,

v.

HARRY RUSSELL, Warden,
Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner's objections to the Magistrate Judge's Report and Recommendation fail to assert any new law or arguments in support of his petition, which have not already been adequately addressed by the Court. As and for his response, Respondent accepts the Court's analysis and incorporates those findings together with the arguments previously set forth in his answer and return of writ. Respondent respectfully submits that the well reasoned Report and Recommendation should be adopted as the Order of this Court.

Respectfully submitted,

JIM PETRO (0022096)
Ohio Attorney General

/s/ Bruce D. Horrigan
BRUCE D. HORRIGAN (0047170)
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Counsel for Respondent
Harry Russell, Warden

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded to counsel for Petitioner, Paul A. Mancino, Jr., Suite 1016, 75 Public Square, Cleveland, Ohio 44113 by regular U.S. mail this 10th day of July, 2003.

/s/ Bruce D. Horrigan
BRUCE D. HORRIGAN (0047170)
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MEMORANDUM OPINION

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Jack B. Streepy (ECF # 17) recommending that the Court dismiss the Petition for a Writ of Habeas Corpus brought by a Person in State Custody pursuant to 28 U.S.C. § 2254 (ECF # 1). Objections have been filed to the Report and Recommendation.

This Court has reviewed the Magistrate Judge's Report and Recommendation *de novo*. See Fed. R. Civ. P. 72(b). The Court has considered all of the pleadings, affidavits, motions and filings of the parties as well as Petitioner's objections. After review, this Court adopts the well-reasoned and thoroughly analyzed opinion of the Magistrate Judge as its own. Magistrate Judge Streepy correctly determined that Petitioner is not entitled to relief pursuant to 28 U.S.C. § 2254.

The Report and Recommendation of the Magistrate Judge is, therefore, hereby ADOPTED. For the reasons set forth by the Magistrate Judge, Petitioner's petition for a writ of habeas corpus is denied. The Court further certifies, pursuant to 28

U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: 7/10/03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 1520

JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

JUDGMENT

In accordance with the Memorandum Opinion of this date, Petitioner's motion filed pursuant to 28 U.S.C. § 2254 (ECF # 1) is DENIED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: 7/10/03

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed AUG 6, 2003]

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MOTION FOR A NEW TRIAL OR TO
ALTER AND AMEND JUDGMENT

Now comes petitioner, Keith Bowles, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure and moves that the court alter and amend the order entered July 28, 2003.

The undersigned, on July 31, 2003, received the following terse notices from the court. The court stated there was memorandum opinion adopting the Magistrate Judge's report and recommended decision. However no memorandum was attached and the cryptic statement did not identify any such document.

There is no indiction on the attachments that the objections were considered by the court which were filed by petitioner.

Petitioner filed objections pointing out deficiencies in the report and recommended decision of the Magistrate Judge. Petitioner was entitled to a *de novo* review of the entire record. It does not appear that was done from the attached orders.

Petitioner therefor requests that the court alter and amend its judgment and consider petitioner's objection and grant appropriate habeas corpus relief.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner
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Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing *Motion for a New Trial or to Alter and Amend Judgment* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 6th day of August, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

Motion Denied. s/Donald C. Nugent, U.S. District Judge
Case 1:02-cv-01520-DCN Document 25 Filed 09/09/2003

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed AUG 6, 2003]

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JUDGE DONALD C. NUGENT

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(216) 621-1742

SERVICE

A copy of the foregoing *Motion for a New Trial or to Alter and Amend Judgment* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section, 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 6th day of August, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed DEC. 12, 2003]

CASE NO. 1:02 CV 1520
JUDGE DONALD C. NUGENT

KEITH BOWLES,

Petitioner,

v.

HARRY RUSSELL,

Respondent.

MOTION TO VACATE AND TO
REOPEN TIME TO APPEAL

Now comes petitioner, Keith Bowles, pursuant to Rule 77 of the Federal Rules of Civil Procedure and Rule 4(a)(6) of the Federal Rules of Appellate Procedure and moves that the order apparently entered September 9, 2003 denying a motion for a new trial be vacated because the undersigned was never sent nor did the undersigned ever received notification of that order.

The undersigned, on December 5, 2003, obtained a docket in the above case. For the first time the undersigned noticed that the court entered an order denying petitioner's motion for a new trial or to alter and amend judgment which had been filed on August 6, 2003. The docket does not reflect that this order was sent to anyone and the undersigned has never received this order. The first time the undersigned was aware of this order was when the undersigned reviewed the docket on December 5, 2003.

Rule 77(d) of the Federal Rules of Civil Procedure provides that immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in a manner provided for in Rule 5 of the Federal Rules of Civil Procedure. It further provides that lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted by Rule 4(a) of the Federal Rules of Appellate Procedure.

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides the following:

> Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry, and
>
> (C) the court finds that no party would be prejudiced.

Wherefore, petitioner moves that the order be vacated and that petitioner may timely file a notice of appeal.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorneys for Petitioner
75 Public Square #1016
Cleveland, Ohio 44113-2098
(216) 621-1742

SERVICE

A copy of the foregoing *Motion to Vacate* has been mailed to Bruce Horrigan, Assistant Attorney General, State Office Building, Corrections and Litigation Section 11th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 12th day of December, 2003.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner

STATE OF OHIO :

: *SS*

CUYAHOGA COUNTY:

AFFIDAVIT

I, PAUL MANCINO, JR., being duly sworn, deposes and states the following:

1. He is the Attorney for petitioner Keith Bowles in the within action; that he filed the petition for writ of habeas corpus and filed all pleadings in connection with this case.

2. Affiant states that at no time did he ever receive an order from the court or the clerk that the court had denied petitioner's motion for a new trial or to alter and amend judgment which was entered on the docket on September 9, 2003.

3. Affiant states that the first notice the undersigned had that the petition had been overruled was when the undersigned obtained a copy of the court's docket on December 5, 2003; that at no time did the undersign ever receive a copy of the order from either the court or the clerk.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR.

SWORN TO AND SUBSCRIBED, in my presence on this 9th day of December, 2003.

/s/ Carla Ann DeRose
Notary Public

No
Expiration Date

As to Re-Opening of Appeal to Rule 4(a)(6). Appeal to be filed by 2/27/04. Motion Denied as to Motion to Vacate GRANTED X DENIED _ IT IS SO ORDERED
/s/ Donald C. Nugent 2/10/04, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed DEC. 12, 2003]

CASE NO. 1:02 CV 1520
(JUDGE DONALD C. NUGENT)

KEITH BOWLES,
Petitioner,

vs.

HARRY RUSSELL, Warden,
Respondent.

MOTION TO VACATE AND TO
REOPEN TIME TO APPEAL

Now comes petitioner, Keith Bowles, pursuant to Rule 77 of the Federal Rules of Civil Procedure and Rule 4(a)(6) of the Federal Rules of Appellate Procedure and moves that the order apparently entered September 9, 2003 denying a motion for a new trial be vacated because the undersigned was never sent not did the undersigned ever received notification of that order.

The undersigned, on December 5, 2003, obtained a docket in the above case. For the first time the undersigned noticed that the court entered an order denying petitioner's motion for

a new trial or to alter and amend judgment which had been filed on August 6, 2003. The docket does not reflect that this order was sent to anyone and the undersigned has never received this order. The first

* * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed FEB. 26, 2004]

CASE NO. 1:02 CV 1520
(JUDGE DONALD C. NUGENT)

KEITH BOWLES,
Petitioner-Appellant,

vs.

HARRY RUSSELL, Warden,
Respondent-Appellee.

NOTICE OF APPEAL

Now comes petitioner-appellant, Keith Bowles, and hereby gives notice of appeal to the United States Court of Appeals for the Sixth Circuit from the judgment and final order of the United States District Court dismissing his petition for writ of habeas corpus, and from the order of the United States District Court overruling his motion for a new trial or to alter and amend judgment, which judgments and final orders were entered on July 10, 2003 and September 9, 2003.

This notice of appeal is being filed pursuant to an order granting petitioner's motion to reopen his appeal which order was entered on February 10, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant
75 Public Square, #1016
Cleveland, Ohio 44113-2098
(216) 621-1742
(216) 621-8465 (Fax)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed MAR. 10, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

It appears from the documents before the court that the judgment of the district court was entered July 28, 2003. A time-tolling motion for new trial or to alter or amend the judgment was denied by order entered September 9, 2003. Counsel for the appellant filed on December 12, 2003 a Fed. R. App. P. 4(a)(6) motion to reopen the appeal period. By marginal ruling, the district court judge granted the motion, and directed that a notice of appeal be filed by February 27, 2004. However, Fed. R. App. P. 4(a)(6) limits the district court to reopening "the time to file an appeal for a period of 14 days after the date when its order to reopen is entered . . . ." The ruling granting the motion to reopen was entered on February 10, 2004. Pursuant to Fed. R. App. P. 4(a)(6), the district court was only permitted to reopen the appeal period until February 24, 2004. *See* Fed. R. App. P. 26(a). The notice of appeal filed on February 27, 2004 was late. *See* Fed. R. App. P. 4(a) and 26(a).

It is therefore ordered that appellant show cause in writing not later than twenty-one days from the date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ordered that the briefing schedule be held in abeyance pending the resolution of the question of jurisdiction.

ENTERED PURSUANT TO RULE 45(a)
RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ Leonard Green
LEONARD GREEN

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

RESPONSE TO ORDER OF MARCH 10, 2004

The court, in its order dated March 10, 2004, states that the notice of appeal was not timely filed. The court correctly notes that the District Court granted the motion to reopen the appeal. The court specifically stated that the notice of appeal had to be filed by February 27, 2004. Petitioner- appellant and counsel relied on the ruling from the court that the notice of appeal could be filed by February 27, 2004. Accordingly, the notice of appeal was filed on February 26, 2004 in accordance with the order issued by the District Court.

Rule 6(b) of the Federal Rules of Civil Procedure allows a court to enlarge the time in which to perform or do an act required by law. The only exception is that a court may not extend the time for taking action under Rule 50(b) and (c)(2), 52(b), 59(d) and (e), and 60(b). Since the District Court had jurisdiction to enter the order that it did enter the court certainly had jurisdiction and authority to extend that time when not specifically prohibited by law. Since the District Court was not prohibited for making the order that it did, the court certainly had a right to extend the time to perform the act.

In any event, the Court of Appeals has jurisdiction to review the order of the District Court which was entered on

February 10, 2004. The notice of appeal was filed within thirty (30) days of the date of that order. Petitioner should not be deprived of his right of an appeal when he was never given notice of the order overruling his motion for a new trial or to alter and amend judgment.

Rule 77(d) of the Federal Rules of Civil Procedure provides that immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in a manner provided for in Rule 5 of the Federal Rules of Civil Procedure. It further provides that lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted by Rule 4(a) of the Federal Rules of Appellate Procedure.

The District Court was presumably aware of the fourteen day rule and extended that time on its own thus giving petitioner-appellant until February 27, 2004 to file his notice of appeal. Petitioner-appellant filed his notice of appeal on February 26, 2004 within the time period as enlarged by the District Court. Therefore this appeal should not be dismissed and should proceed accordingly.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant
75 Public Square, #1016
Cleveland, Ohio 44113-2098
(216) 621-1742
(216) 621-8465 (Fax)

SERVICE

A copy of the foregoing Response to Order of March 2004 was mailed to Bruce D. Horrigan, Assistant Attorney General Corrections and Litigation Section, State Office Building, 11th Fl. 615 West Superior Avenue, Cleveland, Ohio 44113-1899, on this 26th day of March, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed APR 26, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,
v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Before: RYAN, DAUGHTREY, and CLAY, *Circuit Judges.*

This matter is before the court upon consideration of the appellant's response to this court's order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal. Counsel for the appellant has filed a response in which he states that he filed a notice of appeal within the appeal period which was reopened by the district court; that Fed. R. Civ. P. 6(b) allows a court to enlarge the time period to perform or do an act required by law; and that the district court had the right to extend the time for filing the notice of appeal. Counsel also argues that the notice of appeal was timely filed from the February 10, 2004 order reopening the appeal period, and that the appellant should not be deprived of his right to appeal because he never received notice of the ruling on the motion for a new trial or to alter or amend the judgment.

It appears from the documents before the court that the district court's memorandum opinion and separate judgment were entered July 28, 2003. The motion for a new trial or to

alter or amend the judgment was filed on August 6, 2003 and tolled the appeal period. *See* Fed. R. App. P. 4(a)(4). The motion was denied by order entered September 9, 2003. Counsel for the appellant filed a Fed. R. App. P. 4(a)(6) motion on December 12, 2003 seeking to vacate the order denying the motion for a new trial and to reopen the appeal period. The motion also quoted the entire language of Fed. R. App. P. 4(a)(6). By marginal ruling dated and entered February 10, 2004, the district court judge directed that the notice of appeal be filed by February 27, 2004 as directed by Fed. R. App. P. 4(a)(6), and denied the portion of the motion seeking to vacate the order denying the motion for a new trial. The notice of appeal was filed on February 26, 2004.

Although the notice of appeal was filed within the appeal period as reopened by the district court, Fed. R. App. P. 4(a)(6) provides that "[t]he district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered . . . ." The district court's ruling entered February 10, 2004 gave the appellant until February 27, 2004 in which to file a notice of appeal. This was seventeen days rather than the permitted maximum of fourteen days. Fed. R. App. P. 26(a) provides that weekends and holidays be deleted from the computation of time only when the prescribed period is less than eleven days. Fed. R. App. P. 4(a)(6) is the exclusive method for reopening or enlarging the appeal period when the appellant fails to receive notice of a district court's decision, and the time for filing a Fed. R. App. P. 4(a)(5) motion for an extension of time has expired. *See Vencor Hosps., Inc. v. Standard Life & Acc. Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000); *Zack v. United States*, 133 F.3d 451, 453 (6th Cir. 1998); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 361 (8th Cir. 1994). The district court has no discretion to grant an extension beyond the time provided by Fed. R. App. P. 4(a)(5) and 4(a)(6). *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (per curiam). Although counsel

cites to Fed. R. Civ. P. 6(b) as giving the district court authority to grant the seventeen-day extension, Fed. R. Civ. P. 6(b) gives the district court discretion to enlarge the time to perform an act required "by these rules or by a notice given thereunder or by order . . . ." However, it is the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure, which prescribes the time period for filing a notice of appeal or motion seeking to enlarge the appeal period. Fed. R. App. P. 26(b)(1) limits enlargement of an appeal period to what is authorized in Fed. R. App. P. 4. The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App. P. 4(a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam).

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction as it applies to the July 28, 2003 judgment and the September 9, 2003 order. The appeal was timely filed as it applies to the February 10, 2004 ruling.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed SEP 8, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Keith A. Bowles appeals a district court judgment that denied his habeas corpus petition filed under 28 U.S.C. § 2254. The receipt of his appeal has been construed as an application for a certificate of appealability ("COA") under Fed. R. App. P. 22(b).

To obtain a COA, Bowles must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and

> that jurists of reason would find it debatable wiled-lei the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Bowles has not met that burden here because his claims are all lacking in substantive merit, barred by an unexcused procedural default, and/or based on issues of state law that do not rise to the level of a constitutional violation.

Therefore, the COA application is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

vs.

HARRY RUSSELL,
Respondent-Appellee.

MOTION FOR RECONSIDERATION

Now petitioner-appellant, Keith Bowles, and moves that the court reconsider the denial of a certificate of appealability. In an order issued September 8, 2004, the court denied a certificate of appealability. Petitioner requests reconsideration of the denial of a certificate of appealability.

This court, on April 26, 2004, stated that it would review an order of the court dated February 10, 2004. However by denying a certificate of appealability now the court has precluded such an appeal.

The Supreme Court in *Miller-El v. Cockrell*, 123 S.Ct.1029 (2003), the court ruled that to obtain a certificate of appealability a habeas petitioner must show that reasonable jurists could debate whether petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. To issue a certificate of appealability does not require a showing that the appeal will succeed.

Petitioner has presented substantial issues that were not addressed by the District Court. To stated that there are no federal issues presented in this case is to ignore petitioner's claims which are apparent on the face of the record. A

significant issue presented a constitutional claim which was petitioner's claim concerning the jury panel that appeared for petitioner's case which jury panel had been exposed to the trial of a co-defendant. The District Court nor the Magistrate Judge even acknowledged what was stated by this court in *Quintero v. Bell*, 256 F.3d 409 (6th Cir.2001).

In *Quintero* habeas corpus relief was granted to a state prisoner where jurors who sat on the prisoner's trial had previously sat on the trial of a co-defendant several months earlier. The court ruled that this violated the defendant's right to have a trial with impartial and unbiased jurors as guaranteed by the Sixth Amendment. The same rational applies in this case. In addition, there were other infirmities with the trial jurors in this case.

This case was tried after another case involving a shooting committed by Michael Love almost simultaneously and at the same location (Supp.Tr.12, 50, 53-54, 56-57, 94-95). This tainted the entire jury pool. To be impartial jurors must posses a ". . . mental attitude of appropriate indifference, . . ." *United States v. Ward*, 299 U.S.123, 145-46 (1937).

This certainly does not represent a fair and impartial jury. Too may jurors knew of the case in this small community. The court, on its own motion, should have moved the case. In *Irvin v. Dowd*, 366 U.S.717 (1961), the Supreme Court ruled that a jury which included eight person who had expressed opinions as to the defendant's guilt of the crime and which offense had received extensive newspaper, radio and television coverage did not meet the constitutional standard of impartiality:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt form his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man. . . . 366 U.S. at 727.

No less is required in this case and defendant is entitled to a new trial. *Sheppard v. Maxwell*, 384 U.S.333 (1966).

There were no black venire persons. Petitioner, who was black, did not have a fair an impartial jury. (Tr.Supp.Tr.86).

Under the Sixth Amendment to the United States Constitution it is provided that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and a public trial, by an impartial jury of the State and District wherein the crime shall have been committed; . . ." A cognate provision of the Ohio Constitution, Section 10 of Article I likewise so provides.

In *Taylor v. Louisiana*, 419 U.S.522 (1975) a court ruled that jury venires must be reasonably representative of the community if this is not so a defendant is denied his right have a jury comprised of a fair cross-section of the community. This has been further refined in the case of *Duran v. Missouri*, 439 U.S.357 (1979).

Petitioner was entitled to have Juror White excused for cause. He was the brother of the Painesville Chief of Police. (Supp.Tr.10, 19-20). Painesville was the place where this happened and was prosecuting this case. Thus, Juror White should have been excused for cause. (Supp.Tr.87-88).

Rule 24(B)(10) of the Ohio Rules of Criminal Procedure provides a challenge for cause of a juror because ". . . he is related by consanguity or affinity within the fifth degree . . . to the person on whose complaint the prosecution was instituted. . . ." Painesville prosecuted this case. Being the Chief's brother would disqualify him. See Ohio Rev.Code § 737.05.

A second compelling issue is the use by the prosecutor concerning the fact that petitioner did not come forward and made a statement to the police.

The Magistrate Judge stated that the prosecution offered evidence that petitioner did not come forward to make a statement for nearly two (2) months after the incident even though he was aware the police were looking for him it was permissible because it is relevant to prove petitioner was attempting to evade the police. This was absolutely incorrect. Even if the police were looking for petitioner, petitioner was not required to make a statement. There was absolutely no relevance to anything in this case other than to bring before the jury that the prosecutor claimed that petitioner was obligated to make a statement and since he did not make a statement that was evidence of his guilt. The analysis by the court was flawed. The Magistrate Judge did not even consider what occurred at the trial and the context in which it occurred at the trial. The prosecutor improperly questioned petitioner when he testified. Later the prosecutor commented on the fact that petitioner did not come forward and voluntarily to make a statement to the police.

Petitioner testified in his own behalf On cross-examination by the prosecutor the petitioner's right not to make a statement and remain silent was infringed. Thus, petitioner was questioned as to whether he went to the police to make a statement. (Tr.321-22). Moreover, the prosecutor asked petitioner: "you never went and told the police about anything that happened, did you?" (Tr.435).

Moreover, in closing argument the prosecutor again alluded to the fact that petitioner did not go to the police and make a statement. (Tr.486). Objections were overruled by the court.

This was wholly unfair and deprived petitioner of a fair trial. In *Milnor v. Black*, 527 F.2d 1 (6th Cir.1975), the defendant in a state criminal prosecution testified in his own behalf. In cross-examination defendant was questioned, without objection, about his failure to tell the police about his alibi. This failure was also alluded to in final argument by the

prosecutor. The court ruled that even in absence of an objection this deprived defendant of a fair trial. See *United States v. Tenorio*, 69 F.3d 1103 (11th Cir.1995).

In *State v. Sabbah*, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals for Sandusky County ruled that this was prejudicially erroneous.

In *Doyle v. Ohio*, 426 U.S.610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be constitutional error. This was the same error committed in this case. Petitioner had no need to make a statement. If petitioner was brought into custody and would have to have been advised of his rights and could have declined to make a statement.

Extensive testimony was offered concerning efforts to contact petitioner. This evidence was allowed over defense objection. This in effect, deprived petitioner of a fair trial. Petitioner, even if contacted by the police would have to be advised of his constitutional right not to make a statement. *Miranda v. Arizona*, 384 U.S.436 (1966). This type of evidence cannot be used against petitioner. Thus, allowing the prosecutor to offer evidence concerning attempts to contact petitioner deprived him of a fair trial.

Det. Robert Sayer testified that as a result of his interview with Damon Anderson that he learned other names. He was asked what he did (Tr.319). Sayer testified that he contacted these other parties. He was given and was then asked who he contacted. (Tr.319). Sayer testified that he contacted Richard Hayden and Jamal Russell. There were attempts made to contact petitioner (Tr.320). Thereafter, Sayer related his efforts concerning his efforts to contact petitioner.

Sayer claimed he spoke with a person who identified himself as Keith Bowles. This unknown person told Sayer that he would be in. (Tr.322). Thereafter, Sayer related that he went to Cleveland, stopped at Bowles' home but could not locate him to serve the warrant. Later, after an indictment, a second warrant was issued on September 4, 1998. (Tr.324, 326).

Thereafter, Sayer testified that the FBI became involved because of a fugitive from justice warrant for petitioner. (Tr.329). This evidence was totally irrelevant, prejudicial and denied petitioner a fair trial.

"It is improper 'under the guise of "artful cross-examination" to tell the jury the substance of inadmissible evidence." *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir.1999).

More recently, one court found that this type of questioning to constitute prosecutorial misconduct. It was ineffective assistance of counsel for not objecting to this type of questioning. *Washington v. Houfbauer*, 228 F.3d 689 (6th Cir.2000)

In *Berger v. United States*, 295 U.S. 78 (1935), it was alleged that the prosecuting attorney overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. The record showed that the prosecuting attorney was guilty of misstating the facts in his cross-examination of witnesses, putting into the mouths of such witnesses things that they had not said; suggesting by his questions that the statements has been made to him personally out of court and pretending to understand that a witness said something which he had not said and persistently cross-examining witnesses upon the basis, assuming prejudicial facts not in evidence, by bullying and arguing with witnesses, and thoroughly conducting himself in an indecorous and improper manner. The court held that this type of conduct deprived one of a fair trial. Even in instances where the trial court did sustain some objections, this would not be enough. 295 U.S. at 85.

Third, the District Court did not acknowledge petitioner's constitutional right to present a defense when the trial court refused to instruct on a lesser included offense.

The right to an instruction to an instruction on a lesser included offense is a component of the right to present a defense guaranteed by the constitution. *Washington v. Texas*, 388 U.S.14 (1967).

An instruction on a lesser included offense was noted by the court as a component of the right to present a defense. *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2000).

Petitioner requested that the jury be instructed on assault. The evidence presented by petitioner was that petitioner only hit Ollie Gibson and was in no way responsible for the fatal blows to Ollie Gibson. Ollie Gibson died from wounds that he received from the stomping to his head by Richard T. Hayden. (Tr.244). None of these injuries inflicted by petitioner were fatal or contributed to death.

The prosecutor conceded that petitioner did not kick Gipson in the head. ("it's not represented to any of you that Keith Bowles kicked him in the head. . . ." Tr.514).

In these circumstances petitioner was entitled to an instruction on the lesser included offense of assault. The denial of petitioner's request was improper and prejudicial. (Tr. 466-67).

Petitioner's entitlement to an instruction on assault was decided in *State v. Cochrane*, 151 Ohio St.128, 84 N.E.2d 742 (1949). In *Cochrane* the defendant was indicted for murder in the first degree. The victim died as a result of being hit in the jaw. This caused the decedent to fall against a chair occupied by another patron. After the defendant left the scene the decedent died. At trial the case was submitted to the jury on the charge of first degree murder, second degree murder and manslaughter. The defendant was convicted of second

degree murder and sentenced accordingly. On further appeal to the Ohio Supreme Court, the court ruled that the defendant was entitled to an instruction on the lesser offense of assault and battery:

> If in the trial on an indictment for murder it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish beyond a reasonable doubt a casual connection between the criminal agency and the cause of death or because the evidence fails to establish any other essential element of such offenses, it is competent for the jury where the evidence warrant it, to find the defendant guilty of assault and battery only and under such circumstances it is error to the prejudice of the defendant to refuse a request to charged on the lesser offense of assault and battery.

The Due Process Clause of the Fourteenth Amendment requires that lesser included offenses be submitted to the jury. This was noted by the Supreme Court in *Hooper v. Evans*, 456 U.S. 605 (1982).

> *Beck v. Alabama*, 447 U.S. 625 (1980), held that the due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence, Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State*, 291 Ala.71, 74, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given "if

> the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 413 U.S. 205, 208, 93 S.Ct. 1193, 1995, 36 L.Ed2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases. 456 U.S. at 611-12.

Moreover, other courts have held that it is required that an instruction upon a lesser included offense be given. *Brewer v. Overberg*, 524 F.2d 51 (6th Cir. 1980).

It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of a lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See Sansone v. United States*, 380 U.S. 343, 349 (1965).

Lastly, petitioner was denied his constitutional rights when the jury was given an instruction which eliminated the requirement of proof by the prosecution.

> In instructing the jury on aiding and abetting the jury was told that:
>
> Thus, participation in criminal intent may be inferred from the presence, companionship and conduct before and after the offense is committed. (Tr.536). This was improper and unconstitutional.

Such a presumption which foregoes the necessity of proof is unconstitutional, especially where it relieves the state of proving all elements of the offense with evidence beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The Magistrate Judge, in considering this claim, stated that the presumption given by the trial court was not uncon-

stitutional because of other instructions given. Thus, there was no error. However this was an important component of the instruction.

Although a court is required to consider the entire jury charge, an instruction which relates to the burden of proof and one which relieves the state from proving an element of the offense is subject to special scrutiny. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court considered an instruction which stated a presumption. As stated by the court:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. The reviewing court has no way of knowing which of two irreconcilable instructions the jury applied in reaching their verdict. . . . 471 U.S. at 322.

Petitioner therefore requests reconsideration.

/s/ Paul Mancino, Jr.
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(216) 621-1742
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SERVICE

A copy of the foregoing *Motion for Reconsideration* was mailed to Bruce D. Horrigan, Assistant Attorney General, Corrections Litigation Section 615 W. Superior Avenue, 11th Floor, Cleveland, Ohio 44113, on this 16th day of September, 2004.

/s/ Paul Mancino, Jr.
PAUL MANCINO, JR. (0015576)
Attorney for Petitioner-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed DEC 28, 2004]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

ORDER

Before: MARTIN and MOORE, *Circuit Judges*; BELL, *District Judge*.*

Keith A. Bowles appeals a district court judgment that denied his habeas corpus petition filed under 28 U.S.C. § 2254. He now moves for reconsideration of our court's order that denied his application for a certificate of appealability.

Upon review, we grant a certificate of appealability on the following issues: whether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police. See Fed. R. App. P. 40(a). The clerk's office is directed to establish a briefing schedule regarding these issues.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN

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* The Honorable Robert Holmes Bell, United States Chief District Judge for the Western District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed DEC 28, 2005]

No. 04-3262

KEITH BOWLES,
Petitioner - Appellant,

v.

HARRY RUSSELL, Warden,
Respondent - Appellee.

Before: BOGGS, *Chief Judge*; GIBBONS, *Circuit Judge*; and ROSE, *District Judge*.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the appeal from the judgment of the district court is DISMISSED for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 02-01520—Donald C. Nugent, District Judge.

Submitted: October 25, 2005

Decided and Filed: December 28, 2005

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; and ROSE, District Judge.*

COUNSEL

ON BRIEF: Paul Mancino, Jr., MANCINO, MANCINO MANCINO, Cleveland, Ohio, for Appellant. Bruce D. Horrigan, CORRECTIONS LITIGATION SECTION, Cleveland, Ohio, for Appellee.

OPINION

BOGGS, Chief Judge. This is a case about missed deadlines. At times, they go unnoticed, but sometimes the lapse is fatal. This case presents one of the fatal variety. Petitioner Keith Bowles failed to receive timely notice of the district

* The Honorable Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

court's ruling that triggered his appeal period. When he did receive notice, he correctly sought relief under Fed. R. App. P. 4(a). When the district court granted his requested relief but mistakenly offered an erroneous deadline, Bowles chose it and failed to comply with the deadline of February 24, 2004. This court on motion declined to dismiss his appeal. Today, we correct that error and hold that the fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not susceptible to extension through mistake, courtesy, or grace.

I

On August 22, 1998, Keith Bowles, Richard Hayden, Damon Anderson, and Jamal Russell drove from Cleveland to Fairport Harbor, Ohio to see a performance at a bar called Hellbusters. The group left the bar early in the morning and drove to nearby Painesville to attend an after-hours party at the Argonne Arms apartment complex. On their way to the party, they passed a bar called Nino's, outside of which they saw Hayden's cousin, Marcus Moore, in some physical distress. Later, after rendezvousing with Moore, they learned from him that he had been jumped and beaten by a group of men from Painesville including Antonio Rymmer.

Bowles, Hayden, Anderson, and Russell agreed to search for Rymmer at the Argonne Arms and extract their revenge. When they found Rymmer, and he was armed, the group decided to delay their plan. Soon after, the group happened upon the victim, Ollie Gipson. Gipson appeared as if he might be armed and, when it became clear that he was not, Bowles, Hayden, and Anderson beat him. The final, deadly, blows were administered by Hayden after Bowles had returned to the car. Gipson died the next day as a result of his injuries. Bowles was indicted on September 4, 1998, for his part in the beating on a charge of felonious assault in violation of Ohio Revised Code § 2903.11, and murder in violation of § 2903.02(B).

In the trial court, Bowles moved for dismissal, arguing that Ohio's Revised Code had created two categories of murder in contravention of the Fourteenth Amendment. *See* U.S. Const. amend. XIV. The court denied the motion and held that the Supreme Court has never held unconstitutional the individual states' ability to enact felony-murder statutes. *See Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (holding "[t]hat states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge"). On March 3, 1999, an Ohio jury entered a verdict of guilty on a single count of murder and sentenced Bowles to serve an indefinite term of imprisonment of fifteen years to life in an Ohio correctional facility.

Bowles appealed his case to both the Court of Appeals and Supreme Court of Ohio. Both denied him relief. *See Ohio v. Bowles*, No. 99-L-075, 2001 WL 502042 (Ohio Ct. App. May 11, 2001). The one-year statue of limitations for federal habeas began running when the ninety-day certiorari period ended. *See Abela v. Martin*, 348 F.3d 164, 172 (6th Cir. 2003); 28 U.S.C. § 2244(d)(1) (allowing a one-year statute of limitations on filing from the day a state conviction becomes final).

On September 5, 2002, Bowles filed his federal petition for a writ of habeas corpus. The case was referred to a magistrate judge, who, on May 23, 2003, issued a report and recommendation that the petition be denied. Bowles filed a lengthy objection to the magistrate judge's report, but United States District Judge Nugent, on July 10, 2003, adopted the findings in a short memorandum opinion, additionally denying the petitioner a certificate of appealability pursuant to 28 U.S.C. § 2253(c). The order was docketed on July 28, 2003.

On August 6, 2003, Bowles moved for a new trial under Rule 59 or to amend the judgment under Rule 52, objecting to the adoption of the magistrate judge's report without, he

argued, de novo review of the findings. *See* Fed. R. Civ. P. 52, 59. The motion was denied on September 9, 2003, the date of the final, appealable order in this case. Accordingly, a timely notice of appeal would have been entered, at the latest, by October 9. *See* Fed. R. App. P. 4(a)(1)(A) (giving thirty days to appeal a final judgment). However, instead of filing his notice, Bowles, remained silent for ninety-four days. All possible avenues of appeal closed during this period, save one. Only Fed. R. App. P. 4(a)(6) allows a party to timely file a notice of appeal ninety-four days after judgment. See Fed. R. App. P. 4(a)(1) (requiring a notice of appeal to be filed within thirty days of judgment); Fed. R. App. P. 4(a)(4) (granting thirty days for appeal after the disposal of some motions including those under Fed. R. Civ. P. 59); Fed R. App. P. 4(a)(5) (extending time an additional thirty days for "excusable neglect or good cause").

On December 12, 2003, Bowles moved to reopen the appeal period pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Bowles claimed that the order of September 9, in contravention of the Rules, was never served by the court and that he was unaware of the order until December 3, 2003, when he obtained a docket sheet. *See* Fed. R. Civ. P. 77(d) (directing that "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice"). The parties do not dispute the lack of notice, but Bowles blames the error on the court while the Warden claims that Bowles was at fault for failing to comply with the requirements imposed by electronic filing. Regardless, Bowles's contention apparently had merit—the district court granted his motion on February 10, 2004. At this point, the district court inexplicably erred in miscalculating and then stating the cut-off date for the notice of appeal. In its marginal order, citing Rule 4(a)(6), the court denied the motion to vacate but granted the motion to reopen, giving Bowles until February 27 to file his notice of appeal. By its explicit terms, the Rule allows for only a fourteen-day extension. A timely appeal thus was

required to have been filed by February 24. However, Bowles filed his notice of appeal on February 26, timely under the judge's order, but clearly not in compliance with the Rule.

On March 10, 2004, this court issued a show-cause order, questioning the late filing of the appeal. Bowles filed a response and on April 26, 2004, a motions panel of this court discharged the show-cause order and dismissed the appeal for lack of jurisdiction "as it applies to the July 28, 2004 judgment and the September 9, 2003, order." But, the order continued, "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling." On September 8, 2004, construing the appeal as an application for a certificate of appealability under Fed. R. App. P. 22(b), this court denied a certificate of appealability and Bowles promptly petitioned for a rehearing. His motion for reconsideration was entirely concerned with the merits of his habeas petition denied by the district court. On December 28, 2004, perhaps unaware of the procedural disposition of the appeal, a different motions panel of this court granted Bowles's motion for reconsideration and granted in part and denied in part a certificate of appealability on some of the constitutional issues of the case. The order, which makes no mention of timeliness, states:

> [W]e grant a certificate of appealability on the following issues: whether Bowles was denied a fair trial and his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments by the prosecution's questions to him on cross-examination about the fact that he did not make a statement to the police and by the prosecutor's comments regarding his failure to volunteer a statement to the police.

II

A

Respondent Warden argues that lack of subject matter jurisdiction prevents us from hearing the merits of this appeal

and that the jurisdictional scope of this appeal should be limited to the marginal order of February 10, 2004, reopening the time for filing an appeal. Petitioner does not offer any argument relating to the jurisdictional problem presented. However, even if the respondent had overlooked this issue, the Federal Rules of Civil Procedure make it incumbent upon this court to dismiss any action when it appears that the court lacks jurisdiction. Fed. R. Civ. P. 12(h)(3); *Janis v. Ashcroft*, 348 F.3d 491, 493 (6th Cir. 2003).[1] *See also Friends of*

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[1] The Supreme Court has recently distinguished between rules that govern subject-matter jurisdiction and those that are "inflexible claim-processing" rules. *See Eberhart v. United States*, 126 S. Ct. 403 (2005) (per curiam); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). For two reasons, we believe this distinction is not applicable to the case at bar. First, in *Kontrick*, the Court found that "[n]o statute, however, specifies a time limit for filing a complaint objecting to the debtor's discharge. Instead, the controlling time prescriptions are contained in the Federal Rules of Bankruptcy Procedure, specifically, Rules 4004(a) and (b) and 9006(b)(3)." 540 U.S. at 448. Second, the petitioner in *Kontrick*, in answering the untimely complaint, never addressed the issue of untimeliness, and thus forfeited the right to rely on the time limits in the Federal Rules of Bankruptcy Procedure. *Id.* at 459-60 ("No reasonable construction of complaint-processing rules, in sum, would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits").

Similarly, in *Eberhart*, the government opposed the defendant's motion on the merits, ignoring the timeliness problem. Thus, "where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense." 126 S. Ct. at 407. Nor does the court in *Eberhart* identify a specific statute from which Rule 33 could be said to contain an element of subject-matter jurisdiction. *See Kontrick*, 540 U.S. at 453 ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

In both these ways, the case at bar is distinguishable. The government, did not, nor did it need to, oppose Bowles's Rule 4(a)(6) motion in the district court. Instead, it objected to the timeliness of the appeal in its brief. *See* Br. of Resp't at 1 ("This Court lacks jurisdiction to hear this appeal"). And, in contrast to the situation in *Kontrick*, Congress *has* limited our jurisdiction in the Act of December 9, 1991, Pub. L. 102-198,

Crystal River v. EPA, 35 F.3d 1073, 1077-78 (6th Cir. 1994) (applying de novo review to questions of subject matter jurisdiction).

B

The Federal Rules of Appellate Procedure define the applicable deadlines in the courts of appeals. Fed. R. App. P. 1(a)(1); *see* 28 U.S.C. § 2071 (rules are consistent with acts of Congress). *See also* 28 U.S.C. § 2072(b) ("rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). When properly informed of the judgment, a party has thirty days to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A). A limited extension of the time to file may also be granted upon a party's motion under Rule 4(a)(5). *See Zack v. United States*, 133 F.3d 451, 453 (6th Cir. 1998). Where, as in this case, a party claims that he failed to receive notice of a judgment, Rule 4(a)(6) allows the district court to extend the time afforded to file a notice of appeal:

> (6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered*, but only if all the following conditions are satisfied:
>
> > (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

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§ 12, 105 Stat. 1623, 1627 (codified at 28 U.S.C. § 2107) ("the district court may . . . reopen the time for appeal for a period of 14 days . . . ."). For these reasons, we think that Rule 4(a)(6) is, in fact, "a prescription[] delineating the classes of cases" that we may hear. 540 U.S. at 455. In addition, the respondent, by objecting in his brief to this court, never forfeited his right to strict adherence to Rule 4.

> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6) (emphasis added)[2]; 28 U.S.C. § 2107. The Appellate Rules underscore the exclusivity of the 4(a)(6) remedy by explicitly excluding it from the blanket Rule regarding extension of other appellate time prescriptions, "For good cause, the court may extend the time prescribed by these rules. . . . [b]ut the court may not extend the time to file a notice of appeal (except as authorized in Rule 4)." Fed. R. App. P. 26(b); *see Rhoden v. Campbell*, 153 F.3d 773, 774 (6th Cir. 1998).

Petitioner moved to reopen pursuant to Rule 4 (a)(6) on December 12, 2003. In accordance with the Rules, the motion was filed within seven days of December 5, the date on which petitioner received notice of the final judgment. This is also earlier than 180 days after the judgment, March 7, 2004. Finally, December 5 is not within 21 days of the entry of judgment, September 9. On February 10, 2004, the motion was granted and a marginal order reopened the period for appeal, extending it until February 27, 2004. However, according to the Rule, the new appeal period can only extend fourteen days after the date when the order is entered. Since the order was entered on the 10th, the Rule's outermost deadline would have been February 24. *See* Fed. R. App. P. 26(a) (computing time). Petitioner filed his notice of appeal on February 26, 2004, inside of the deadline stated in the order, but outside of the Rule's deadline.

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[2] The rule was amended, effective December 1, 2005. The change requires that notice be pursuant to Fed. R. Civ. P. 77(d) but otherwise the substance of the rule remains the same.

III

A

Rule 4(a) has been interpreted as both mandatory and jurisdictional by the Supreme Court and this Circuit. *See Browder v. Dir., Dept. of Corrs. of Illinois*, 434 U.S. 257, 264 (1978); *In re Sulzer Orthopedics & Knee Prosthesis Prods. Liab. Litig.*, 399 F.3d 816, 817 (6th Cir. 2005); *Peake v. First Nat. Bank and Trust Co. of Marquette*, 717 F.2d 1016, 1018 (6th Cir. 1983); *Oja v. Dep't of Army*, 405 F.3d 1349, 1358 (Fed. Cir. 2005) (noting that it is "beyond cavil" that 4(a)(6) is mandatory and jurisdictional).

Other circuits have described Rule 4(a)(6)'s limited opportunity to reopen the time for appeal as one that "balances the inequity of foreclosing appeals by parties who do not receive actual notice of a dispositive order against the need to protect the finality of judgments," *See Vencor Hosp., Inc. v. Standard Life and Acc. Ins. Co.*, 279 F.3d 1306, 1309 (11th Cir. 2002) (describing the Rule as limited and exclusive).

> According to the Notes of the Advisory Committee on Appellate Rules, the purpose of the 1991 amendment was to provide "a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk pursuant to [Fed. R. Civ P. 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal"

Zimmer St. Louis, Inc. v. Zimmer Co., 32 F.3d 357, 360 (8th Cir. 1994). *See also In re Stein*, 197 F.3d 421, 425 (9th Cir. 1999) (quoting identical language). The Tenth Circuit has found that "the essence" of the Rule is "finality of judgment." *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000). The *Clark* court, like the other circuits to have considered the issue, found the 180-day limitation in the Rule to be "specific and unequivocal" *Id.* at 1040. *See Vencor*, 279 F.3d at 1311;

Servants of the Paraclete v. Does I-XVI, 204 F.3d 1005, 1010 (10th Cir. 2000); *see also* 16A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3950.6 at 228 (1999) ("Rule 4(a)(6) provides the exclusive means for extending appeal time for failure to learn that judgment has been entered. Once the 180-day period has expired, a district court cannot rely on the one-time practice of vacating the judgment and reentering the same judgment in order to create a new appeal period"). "While application of that concept infrequently may work misfortune, it is an overriding principle which demands enforcement." *Clark*, 204 F.3d at 1041. "Moreover, nothing within Rule 4(a)(6) indicates it is permissive or that its limitations may be waived for equitable reasons." *Id.* at 1040 (referring specifically to the 180-day limit).

B

Counseling a contrary and more liberal interpretation of the Rule is a line of Supreme Court cases employing an equitable interpretation of appeals time limits, starting with *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam). In *Harris*, the judgment of the trial court became final while the lead member of the litigation team was on vacation in Mexico. *Id.* at 215-16. The trial counsel in the United States was without direction about whether or not an appeal should be filed, so he moved for an extension to the regular thirty-day limit for filing a notice of appeal pursuant to then Fed. R Civ. P. 73(a), now Fed. R. App. P. 4(a)(5)(A)(ii), allowing an extension where "that party shows either excusable neglect or good cause." *Id.* at 216. The motion was granted, an extra two weeks prescribed, and the notice of appeal was timely filed. *Ibid.* On appeal, however, the Seventh Circuit held that the movant had not met the statutory standard under Rule 73 for "excusable neglect based on a failure of a party to learn of the entry of the judgment," and that jurisdiction was thus lacking. *Harris Truck Lines,*

Inc. v. Cherry Meat Packers, Inc., 303 F.2d 609, 611 (7th Cir. 1962) (quoting FED. R. CIV. P. 73(a)). The Supreme Court reversed, noting the "obvious great hardship to a party who relies upon the trial judge's finding," and held that these decisions should be given "great deference." 371 U.S. at 217. *Harris's* closing language contains a phrase that has come to identify this line of cases: "Whatever the proper result as an initial matter on the facts here, the record contains a showing of *unique circumstances* sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling." *Ibid.* (emphasis added). Thus, in *Harris*, all action was within the relevant time limits. The only quarrel was over the effect of a possibly mistaken substantive ruling on which counsel relied.

Harris was soon followed by *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). In *Thompson*, the trial court explicitly accepted, and the government did not object to, the timeliness of a motion for a new trial that was actually two days late. *Id.* at 386. The motion was denied and a notice of appeal was filed that was timely with respect to the most recent motion, but not as to the original judgment. *Ibid.* The court of appeals dismissed the notice as untimely. *Thompson v. INS*, 318 F.2d 681, 684 (7th Cir. 1963); 375 U.S. at 385. The Supreme Court, however, relying on *Harris, supra*, reversed:

> The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner *did an act which, if properly done, postponed the deadline* for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of

> these 'unique circumstances,' we . . . remand the case to . . . be heard on the merits.

Thompson, 375 U.S. at 387 (quoting *Harris*, 371 U.S. at 217) (emphasis added, citation omitted). Four justices dissented in *Thompson*, finding that it was not analogous to *Harris*. Speaking through Justice Clark, they noted that the court in *Thompson*, unlike the court in *Harris* "had no jurisdiction to pass upon the untimely motions," ten days having already elapsed. *Id.* at 389. Further, they accused the majority of extending *Harris* into a context where "excusable neglect" is neither mentioned nor alleged, making the standard of "unique circumstances" meaningless. *Ibid. Accord, Wolfsohn v. Hankin*, 376 U.S. 203 (1964) (per curiam) (extending time to move for a rehearing where extension was granted within the statutory deadline).

The most recent, and only subsequent, decision to discuss *Thompson* is *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). There, the court held that a postjudgment motion for prejudgment interest is a motion under FED. R. CIV. P. 59 to alter or amend the judgment, and that it operates with Fed. R. App. P. 4(a)(4) to vitiate any notice of appeal filed while the motion is pending. *Id.* at 177. Even though the litigants claimed that the district court had led them to believe that their notice of appeal, made during the pendency of their Rule 59 motion, as timely, the Court refused to apply Thompson to reverse the court of appeals. *Ibid.* The Court made two important statements. First, it stated that *Thompson* required an "affirmative[] represent[ation]" by the district court. *Id.* at 178. Second, it severely limited *Thompson* and stated that *Thompson*, "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his, appeal and has received specific assurance by a judicial officer that this act has been properly done." *Ibid.*

This court has recognize the "unique circumstances" doctrine of *Thompson*. *See, e.g., Lawrence v. The Teamsters*, 320

F.2d 590, 593 (6th Cir. 2003) (excluding court clerks and limiting reliance to statements by judges); *Birrell v. Browns*, 867 F.2d 956, 957 (6th Cir. 1989) (allowing extension of appeal period before 1991 amendment to Fed. R. App. P. 4). Yet, it appears that this specific fact situation has not been considered by this, or any other, circuit.

C

In comparing this case to the available precedents, we note that the circumstances here fall outside of the test formulated in *Osterneck*, that *Thompson* applies "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by judicial officer that this act has been properly done." *Osterneck's*, 489 U.S. at 170. As in *Osteneck's*, "that is not the case here." *Ibid.* First, petitioner's act did not attempt to postpone a deadline for filing his appeal; it was to move for a reopening of the appeal period so that he might file his untimely notice of appeal. Second, it was, in fact, the district court here that performed the improper act and purported to extend the filing date beyond what was permitted by the Rule. Clearly the district court is not a party. Additionally, the chronological order of the actions is distinct from those in *Osterneck*. The rule in that case requires that judicial assurances follow the actions of the party. Here, in contrast, the judicial assurance precedes the party's act. Finally, petitioner receive no assurances from the district court that his notice of appeal was timely. Nor, as we explain below, did this court provide any meaningful assurance that the notice, with regard to any of the merits in the case, /was timely. We believe that *Osterneck's* language to limit the reach of Thompson is applicable in this case. If Thompson is, in fact, a doctrine of "unique circumstances," then it does not apply to the case at bar.

Additionally, considering policy, the *Harris* line of cases operates to excuse neglect on the part of the litigant, not on

the part of the court. They are concerned with the unfairness and "obvious great hardship" of an appeals court reversing a trial courts decision to accept the negligent acts of a litigant, not with the negligent acts of the court itself. *Harris*, 371 U.S. at 217. They are therefore distinguishable through both their facts and the polices they promote. All these cases predate the 1991 amendments to the Rules of Appellate Procedure which, we believe, further undermine any argument for their liberal application in this situation. Bowles's situation is clearly contemplated and treated by the 1991 addition of Rule 4(a)(6). In the words of the Advisory Committee:

> The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court . . . is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced.

Advisory Committee Note to 1991 Amendment to Fed. R. App. P. 4.

We believe that the truly relevant cases are those like *Clark* and *Zimmer*—and that the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule. The "limited opportunity for relief" contemplate by the Rule includes both enumerated periods. Our concerns for finality and economy and the Rule's historical function of relieving unfairness in a single factual situation by providing a set method of relief support this holding. As outer limits, the fourteen-day and 180-day periods are analogous. As one commentator noted, "The new paragraph (6) is explicit on the [14-day] point." David D. Siegel, *The Recent (Dec. 1, 1991,*

Changes in the Federal Rules of Civil Procedure, 142 F.R.D. 359, 379 (1992).

IV

As a final matter, we must determine whether the doctrine of the law of the case, and the history of this litigation prevent us from recognizing the jurisdictional defect and thus require us to consider the merits. As the history above makes clear, there has been a substantial amount of activity in the court of appeals that could support the petitioner's view that the merits are properly before us. However, as we discuss below, this court has never held that jurisdiction is proper in this case. Rather, when the issue of jurisdiction has been properly before us, we have consistently found it to be lacking.

The law of the case, like issue reclusion, or collateral estoppel, prevents the relitigation of an issue once there has been a judgment on the Merits. Later disputes concerning that issue are considered foreclosed in any subsequent suit.

> The doctrine of the law of the case is similar in that it limits relitigation of an issue once it has been decided, but the law of the case doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages.

18 Moore's Federal Practice, § 134.20 (Matthew Bender 3d ed.). "The gist of the [law of the case] doctrine is that once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Int'l Union of Operating Eng'rs, Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 256 (7th Cir. 1994) (quoting *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir.1991)); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). "The law of the case doctrine generally discourages courts from reconsidering determinations that the court made in an earlier stage of the

proceeding" *United States v. Graham*, 327 F.2d 460, 464 (6th Cir. 2003)

Further, the doctrine applies only to issues that have been decided explicitly (or by necessary implication) by a court. *Ibid.* A court need not elucidate or explain its decision, but it must "decide[] upon a rule of law." *Christianson*, 486 U.S. at 817; *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (applying preclusive effect where issue was " determined by a valid and final judgment") (emphasis added); *Rouse v. Daimler-Chrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002) (finding an abuse of discretion where law of the case was applied and, after "careful review," the issue was never actually decided below); *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 442 (6th Cir. 2004) (noting that a decision of a court requires an order); *accord Amelkin v. McClure*, 330 F.3d 822, 828-29 (6th Cir. 2003). Finally, "we recognize that the law of the case doctrine is discretionary when applied to a coordinate court or the same court's own decisions." *Bowling v. Pfizer, Inc*, 122 F.3d 1147, 1150 (6th Cir. 1998) (citing *United States v. Todd*, 920 F.2d 399, 402 (6th Cir.1990)); *See Christianson*, 486 U.S. at 817 (acknowledging the limits of the doctrine in situations of clearly erroneous rulings); *In re Kenneth Allen Knight Trust*, 203 F.3d 671, 677-78 (6th Cir. 2002) (doctrine is discretionary when a court reviews its prior erroneous decision); *Perillo v. Johnson*, 205 F.3d 775, 780-81 (5th Cir. 2000) (doctrine is a matter of judicial discretion rather than judicial power when a court is reviewing its own prior decision).

Accordingly, we look to the prior decisions and orders of this court to determine if the issue of jurisdiction was actually decided in a final judgment. Only the order of April 26, 2004, addresses the issue of petitioner's untimely notice of appeal. That order is almost entirely devoid of any language even suggesting a decision of this court that jurisdiction for this appeal should be sustained. Only the last sentence, discussed

below, could support a positive outcome for the petitioner. The entire discussion of the order supports its conclusion that the appeal be dismissed. Specifically, the appeal is dismissed as it relates to the judgment of July 28 and the order of September 9, 2003. Quizzically, however, the order continues to state, in its last sentence, that the appeal is timely as to the February 10, 2004, ruling.

However, the only appeal/able issues decided in the court below were the judgment to deny the granting of the writ, and the denial of petitioner's motion to reconsider that judgment. The April 26, 2004, order of our court explicitly states that there is no jurisdiction with respect to those issues. It isolates the February 10 ruling extending time to appeal as the sole appealable issue that this court can hear. Yet, when the merits adjudication is removed from the set of appealable issues, a complete absence of subject matter remains. Additionally, why would, 9r could, the petitioner appeal the February order when its outcome was favorable to him? We leave this question unanswered. We hold that the final sentence in the April 26 order was surplusage, that it added no meaning to the order and, therefore, it cannot be construed as a decision of this court. Because this court has not made any decision that is contrary to our ruling today, and because the doctrine of the law of the case is prudential and not jurisdictional, we hold that since the April order is, where explicable, consistent with our reasoning today, the doctrine of the law of the case is not upset in any cognizable way.

V

We therefore hold that this court is without jurisdiction to consider Bowles's appeal. Accordingly, this appeal is DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed APR 21, 2006]

No. 04-3262

KEITH BOWLES,
Petitioner-Appellant,

v.

HARRY RUSSELL, Warden,
Respondent-Appellee.

BEFORE: BOGGS, Chief Judge; GIBBONS, *Circuit Judge*; and ROSE,* *District Judge*.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

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* Hon. Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.